INSTITUTE OF LAW RESEARCH AND REFORM
EDMONTON, ALBERTA

LIMITATIONS

Report For Discussion No. 4

September 1986

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The Institute of Law Research and Reform was established January 1, 1968, by the Government of Alberta, the University of Alberta and the Law Society of Alberta for the purposes, among others, of conducting legal research and recommending reforms in the law. Funding of the Institute's operations is provided by the Government of Alberta, the University of Alberta and the Alberta Law Foundation.

Its office is at 402 Law Centre, University of Alberta, Edmonton, Alberta, T6G 2H5. Its telephone number is (403) 432-5291.

The Members of the Institute's Board are J.W. Beames, Q.C. (Chairman); Professor R.G. Hammond (Director); M.B. Bielby; C.W. Dalton; H.J.L. Irwin; Professor J.C. Levy; Hon. Mr. Justice D.B. Mason; Dr. J.P. Meekison; A.C.L. Sims; B.L. Rawlins; C.G. Watkins. Given the gestation period of this Report, most of the former Members of the Board have contributed to a greater or lesser extent to the Report at various points in its history.

The Institute legal staff consists of Professor R.G. Hammond (Director); R.H. Bowes; Professor D.C. Davies; G.C. Field, Q.C.; Professor T.W. Mapp and M.A. Shone. W.H. Hurlburt, Q.C. is a Consultant to the Institute.

ACKNOWLEDGEMENTS

During the period when the proposals in this Report were developed Professor T.W. Mapp had the primary responsibility for the carriage of this project and the drafting of the Report. However, the Board assumes sole responsibility for the opinions and recommendations in the Report.

PREFACE

and

INVITATION TO COMMENT

The Institute has had a consideration of the difficult topic of reform of civil limitation periods underway for most of its existence as an institution. Initially, the thrust of the project was towards a revision of the existing Alberta statute. This is a traditional limitations statute, under which the various established causes of action are identified and specific limitation periods ascribed to each.

Some Members of the Institute's Board and legal staff began, however, to develop a distinct sense of unease with the Alberta and other conventional limitations statutes. Various concerns surfaced: the existing model was said to be complex, prolix, conceptually confused, and to give rise to unfair results. In the result, the Institute then chose to engage itself in more fundamental "root and branch" reform as opposed to more modest statute revision. The resultant Report reflects an endeavour to evolve a systematic new limitations regime, unshackled by the various chains and difficulties of history and legal evolution.

Any such endeavour will always be frightfully difficult. There are those who will argue that legal development must, of necessity, always be incremental. Others will hold that sometimes discontinuity is necessary and appropriate. To the extent that the Institute has chosen to explore new possibilities, the normal processes of production of a law reform report have been extended. However, we have been much fortified in attempting to see this exercise through to its present point of evolution, in observing, first, that judicial opinion seems now to be in favour of a fundamental review and, second, that in many ways the law has been moving at least some distance towards the position we have now adopted.

As to the first point, there is clear judicial discomfort with the existing statutes, and a sense that a genuinely fundamental inquiry is warranted. For instance, in Costigan v. Ruzicka ((1984) 13 D.L.R. (4th) 368) the Chief Justice of Alberta, the Hon. J.H. Laycraft, expressed concern that reform of the law in this subject area should both "be accomplished by legislation of general import and not in response to the hard case" (at p. 377) and derive an appropriate balance. And in J.R. Sheet Metal and Manufacturing v. Prairie Rose Wood Products et. al. (1986) 67 A.R. 326 (C.A.) Stevenson J.A. also urged the systematic review of the various problems arising "in the light of the principles which limitations statutes [should] reflect". (at p. 329)

As to the second matter, there is a clear tendency towards a so-called "discovery principle" for limitations statutes. However, no law reform report, so far as we are aware, has attempted to work through the problems which would arise if the distinctions between causes of action were done away with altogether, and a discovery rule applied across the spectrum of civil actions.

In the result this is not a final Report. It is a tentative set of conclusions accompanied by draft legislation. The Institute's purpose in issuing a Report for Discussion at this time is to allow interested persons the opportunity to consider these tentative conclusions and proposals and make their views known to the Institute. Any comments sent to the Institute will be considered when the Institute determines what recommendation, if any, it will make to the Alberta Attorney-General.

It is just as important for interested persons to advise the Institute that they approve the proposals and the draft legislation as it is to advise the Institute that they object to them, or that they believe that they need to be revised in whole or in part. The Institute often substantially revises tentative conclusions as a result of comments it receives. Neither the proposals nor the draft legislation have the final approval of the Institute's Board of Directors. They have not been adopted, even provisionally, by the Alberta government.

It is also important that we receive comment on the possible socio-economic impact of our proposals. To this time, our endeavours have been primarily with the conceptual difficulties in the suggested new scheme. We do not doubt that our proposals, if enacted, would change the position of some litigants. We cannot of our own motion calculate all the possible effects, neither do we have the resources to do so. We hope that potentially affected persons and sectors of Alberta life and industry will make their views known to us.

Comments should be in the Institute's hands by December 31, 1986. If more time is needed, please advise before November 30, 1986. Comments in writing are preferred. Oral comments may be made to the Director of the Institute, Professor R.G. Hammond.

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TABLE OF ABBREVIATED REFERENCES

	Reference:	Abbreviation:
	England	
1.	Law Revision Committee, *Fifth Interim Report (Statutes of Limitation)*, (Cmnd. 5534, 1936).	Wright Report
2.	Limitation Act 1939, c. 21.	1939 English Act
3.	Law Reform (Limitation of Actions, etc.) Act, 1954, 2 & 3 Eliz. 2, c. 36.	1954 English Act
4.	*Report of the Committee on Limitation of Actions in Cases of Personal Injury*, (Cmnd. 1829, 1962).	Edmund Davies Report
5.	Limitation Act 1963, c. 47.	1963 English Act
6.	The Law Commission, *Limitation Act, 1963* (Law Com. No. 35, 1970).	1970 Law Commission Report
7.	Law Reform (Miscellaneous Provisions) Act 1971, c. 43.	1971 English Act
8.	Law Reform Committee, *Twentieth Report (Interim Report on Limitation of Actions: In Personal Injury Claims)*, (Cmnd. 5630, 1974).	Law Reform Committee 20th Report
9.	Limitation Act 1975, c. 54.	1975 English Act
10.	Law Reform Committee, *Twenty-First Report (Final Report on Limitation of Actions)*, (Cmnd. 6923, 1977).	Law Reform Committee 21st Report
11.	Limitation Amendment Act 1980, c. 24.	1980 English Amendment Act
12.	Law Reform Committee, *Twenty-Fourth Report (Latent Damage)*, (Cmnd. 9390, 1984).	Law Reform Committee 24th Report
13.	Limitation Act 1980, c. 58.	1980 English Act
	Scotland	
1.	Scottish Law Commission, *Reform of the Law Relating to Prescription and Limitation of Actions*, (Scot. Law Com. No. 15, 1970).	Scottish Law Commission Report

2.	Prescription and Limitation (Scotland) Act 1973, c. 52.	1973 Scottish Act

Uniform Law Conference of Canada

1.	Uniform Limitation of Actions Act	1931 Uniform Act
2.	Uniform Limitations Act	1982 Uniform Act

Alberta

1.	Limitation of Actions Act, R.S.A. 1980, c. L-15	present Alberta Act
2.	Institute of Law Research and Reform, *Working Paper*: *Limitation of Actions*, (June, 1977).	Institute Working Paper

British Columbia

1.	Law Reform Commission of British Columbia, *Report on Limitations; Part 2 General*, (L.R.C. 15, 1974).	B.C. Report
2.	Limitation Act, R.S.B.C. 1979, c. 236.	B.C. Act

Manitoba

1.	An Act to amend the Limitation of Actions Act and to amend Certain Provisions of Other Acts relating to Limitation of Actions, S.M. 1967, c. 32 (the "Manitoba 1967 amendments"), now found as sections 15-21 of The Limitation of Actions Act, C.C.S.M., c. L150.	Manitoba Act
2.	Manitoba Law Reform Commission, *Report on Limitation of Actions: Time Extensions for Children, Disabled Persons and Others* (Report No. 27, 1979).	Manitoba Report

Ontario

1.	Ontario Law Reform Commission, *Report on Limitation of Actions*, (1969).	Ontario Report
2.	Department of the Attorney General, *Discussion Paper on Proposed Limitations Act*, (1977).	Ontario Draft Act

New South Wales

1.	Law Reform Commission, *First Report on the Limitation of Actions*, (L.R.C. 3, 1967).	N.S.W. Report
2.	Limitation Act, 1969 (New South Wales).	N.S.W. Act

South Australia

1.	Twelfth Report of the Law Reform Committee of South Australia, *Law Relating to Limitation of Time for Bringing Actions*, (1970).	S.A. Report
2.	Limitation of Actions Act Amendment Act, 1975, now found as sections 47-50 of the Limitation of Actions Act, 1936-1975 (S.A.).	S.A. Act

PART I. SUMMARY OF REPORT FOR DISCUSSION: LIMITATIONS

Introduction

The subject of this report is frequently called "limitation of actions". When a person (a claimant) believes that one of his legal rights has been violated, and hence that another person (the defendant) has breached a legal duty owed to the claimant, the claimant may bring a claim before a court requesting a judicial remedy. Every judicial system we have studied contains a limitations system comprised of rules which limit the time available to a claimant to bring a claim requesting a judicial remedy. A limitations system achieves its objective of limiting the time available to a claimant to bring a claim by giving the defendant a defence to any claim which is not brought within the specific limitation period established for a claim of that particular type.

Present System

Alberta is a common law jurisdiction; the foundation of its law consists of English judicial decisions and statutes. The law now enforced in Alberta has grown in size and complexity over the centuries, and limitations law is no exception. The central statute in the current Alberta limitations system is The Limitation of Actions Act, enacted in 1935. Although this statute made substantial improvements in Alberta limitations law, and although further improvements were made by amendments in the years following, notably in 1966, we do not believe that the present Alberta Act provides a sufficiently just limitations system for either claimants or defendants, and we think that it is unreasonably long and complex. The present Alberta Act contains 61 sections in 22 pages in the Revised Statutes of Alberta, 1980.

New Act Recommended

We recommend that Alberta enact a completely new limitations statute, and we believe that the specific recommendations in this report can, if accepted, result in a new Alberta Act which will be not only fairer for all persons than the present Act, but simpler and more comprehensible as well. The Draft Limitations Act included as Part IV of this report is, we think, logically organized and written in language which is both plain and legally accurate. This Draft Act contains ten sections in seven pages in this report. We concede that our recommendations are relatively bold, and we emphasize that this is a Report for Discussion. All of our recommendations are tentative, and are designed to stimulate discussion and to elicit constructive comments.

Reasons for Limitations System

We believe that the reasons for a limitations system were sound in the past and will remain so in the future. We have organized these reasons into categories. (1) There are evidentiary reasons. A claimant must allege that he had a right and that some conduct of the defendant violated that right. However, whether or not these allegations are true depends on what actually happened, it depends on the facts. With the passage of time after events have been alleged to have occurred, the evidence necessary to prove the facts will deteriorate. Over time the memories of witnesses will fade, witnesses will die or leave the jurisdiction, and written records will be lost or destroyed. We believe that defendants are more vulnerable because of deteriorated evidence than are claimants. When a point in time has been reached when evidence has become too unreliable to furnish a sound basis for a judicial decision, out of fairness to the defendant, public policy dictates that a claim should not be adjudicated at all.

(2) There are reasons based on peace and repose. At a point in time after the occurrence of conduct which might have been legally wrongful, a defendant is entitled to peace of mind. In addition, society has a broader overriding interest in freeing itself from stale conflicts out of the past. Insofar as human transgressions are concerned, defendants and the entire society need the repose which can be achieved by periodically wiping the slate clean.

(3) There are economic reasons. While a defendant is vulnerable to possible liability of uncertain magnitude under a claim, his ability to enter into business transactions may be adversely affected. A claimant who threatens, but delays bringing a claim, can sometimes extract an unreasonable settlement from a defendant caught in this situation. Many persons who are regularly engaged in providing goods and services for others in the course of their occupations are particularly vulnerable to claims, and they will often be unaware of a specific claim until informed of it, often many years after the occurrence of the events on which it is based. These persons frequently preserve records of their activities and they usually maintain costly liability insurance. The expenses of records

maintenance and insurance are generally passed on to the consuming society. Within a decade after the occurrence of the events upon which a group of claims could be based, most of these claims will have been either abandoned, settled or litigated. At this point the result of peace denied can become excessive cost incurred, for the cost burden on the entire society is too high relative to any benefits which might be conferred on a tiny group of claimants by keeping defendants exposed to claims.

(4) There are judgmental reasons. Whether or not a defendant's conduct breached a duty owed to another frequently depends on the cultural values accepted by the society at the time of the conduct. Because cultural values change, conduct which was acceptable even 20 years ago is unacceptable today. It can be argued that it is often very difficult for a judge of a current generation to weigh the reasonableness of conduct which occurred many years ago as a judge of an earlier generation would have weighed it.

Problems with Present System

We do not think that the present Alberta limitations system operates with sufficient fairness, for either claimants or defendants. Moreover, we think that it is an unnecessarily complex and legalistic system which can seldom be understood by the litigants. Under the present Alberta Act, the different types of possible claims are described and organized into categories, and different limitation periods of fixed duration are matched to different categories of claims. For example, for most tort claims the limitation period is two years beginning with the accrual of the claim, and for most contract claims the period is six years beginning with the accrual of the claim. All too frequently the relevant limitation period will expire before the claimant could reasonably discover enough information to warrant a conclusion that he should bring a claim. This we believe is unfair to claimants. However, probably even more frequently a claimant will have acquired all the information he needs to justify bringing a claim long before the expiration of the applicable limitation period. For this reason the present system gives defendants less protection than we think it should.

We think that our present limitations system is unnecessarily complex and legalistic. For most claims, the limitation period begins to run when the claim accrued. Unfortunately, when some types of claims accrue is a technical legal issue. Which fixed limitation period is applicable to a specific claim depends on the category into which the claim falls, and that depends on the descriptions used for different types of claims. Many different methods can be used to describe a type of claim, and usually several of these methods are used for a particular type of claim. This frequently results in overlapping descriptions. A lawyer can often mount a credible argument that a specific claim could be either a type A claim (subject to a two-year limitation period), a type B claim (subject to a six-year limitation period), or a type C claim (subject to no limitation period). Whether or not a limitations defence is available to a defendant thus often depends on how a specific claim before the court is characterized as to type. When this occurs, neither the litigation nor its result can be explained to the litigants in terms which have anything to do with the common sense issue of whether or not the claim was brought as soon as it reasonably could and should have been brought.

Core Recommendations

Our core recommendations are contained in Chapter 2, and we will summarize the limitations system they will provide. All claims subject to the new Alberta Act will be governed by two limitation periods, and the defendant will be entitled to a limitations defence, upon pleading the Act as a defence, when whichever of these periods expires first. Because all claims subject to the Act will be governed by both periods, problems of characterization and categorization will be eliminated for these claims. One limitation period will begin when the claimant either discovered, or ought to have discovered, specified knowledge about his claim, and will extend for two years. We believe that, for the great majority of claims, this period will expire first. Because this period (referred to as the "discovery period") will depend on a discovery rule, the problems associated with accrual rules will be tremendously reduced. The other limitation period (referred to as the "ultimate period") will extend for ten years, usually from the accrual of a claim. Although we do not believe that this period will strike down many claims, when it is the applicable period there may be accrual rule problems. The courts will be authorized to deny equitable relief to a claimant even when the applicable limitation period under the Act has not expired. However, the courts will not be granted any other discretion to shorten or lengthen an applicable limitation period.

We believe that a new Alberta Act based on our recommendations will be much fairer to claimants because all claims will be subject to a discovery rule. However, the discovery rule will also benefit defendants, for in many cases claimants will have to bring claims sooner than under the present system if they have acquired the required knowledge. The ultimate period will benefit defendants. We believe that an ultimate period is essential for the achievement of the objectives of a limitations system.

We will mention a significant accrual rule problem we have dealt with in Chapter 2. A claim based on the breach of a duty of care (on negligence) does not accrue until damage has been sustained, and it may not accrue until the damage could have been discovered. If the ultimate period for a negligence claim were to begin with the accrual of the claim, which could be decades after the alleged negligent conduct, it would give minimal protection to defendants. We recommend, therefore, that the ultimate period for a claim based on the breach of a duty of care begin when the careless conduct occurred.

Application of Act

In Chapter 3 we consider what claims should be subject to a limitations system. This is a technical area, and we will draw attention to only one of our recommendations. Under our present limitations law, if an owner of property, whether real or personal, does not bring a claim to obtain possession of his property within an applicable limitation period, the claim will be barred, and the person in adverse possession will have acquired ownership for all practical purposes. Although we think that the advantages of this law were paramount in the past, we think that the disadvantages outweigh the advantages now. Consequently, we recommend that no limitation provision be applicable to a claim by an owner to obtain possession of his property, whether real or personal.

Conflict of Laws

Chapter 4 deals with a conflict of laws issue. When a claim brought in Alberta will be decided by an Alberta court according to the substantive law of another jurisdiction, should the limitations law of Alberta, or that of the other jurisdiction, be applied to the claim? We recommend that the limitations law of Alberta be applied to a claim in this situation.

Claims Added to a Proceeding

Chapter 5 is concerned with limitation problems which arise as a consequence of the addition of claims in a proceeding previously commenced. When an action has been started by a timely claim, the parties will often wish to add further claims which are subject to a limitations defence. If the added claims are related to the conduct, transaction or events described in the original pleading in the action, it will often be desirable, for reasons of justice and efficiency, to have them tried in a single action with the original claims. Chapter 5 contains a recommendation which will deprive a defendant of a limitations defence he would normally have to an added claim in the situation we have described, but only if requirements designed to give the defendant alternative limitations protection have been satisfied.

Persons under Disability

The subject of Chapter 6 is persons under disability. We do not think that limitation periods should operate while a person is under disability, but we do believe that one exception to this principle must be made. Under the present Alberta Act, if a person is under disability when his claim accrues (prior disability), special provisions are made which give him time to bring a claim after his recovery. Because of these provisions, defendants remain vulnerable to claims of persons under disability for a very prolonged period of time. However, no special provisions are made for a person who came under disability after his claim accrued (subsequent disability). If the limitation period began, it will continue to run, even if the person lacked enough time between the accrual of his claim and his disability in which to bring the claim. We do not think this is just. Our recommendation reflects a compromise. We recommend that both the discovery and ultimate limitation periods be suspended during any period of time that a person was under disability, but that the maximum suspension of the ultimate period be ten years. Thus, the discovery period will never expire while a person is under disability, and the ultimate period will not extend more than 20 years from the accrual of a claim; it will have ten years of normal operation and a possible suspension of ten years.

Concealment

Chapter 7 is concerned with the situation in which a defendant knowingly and wilfully conceals facts material to a claim. When this happens, it is most unlikely that the discovery limitation period we recommend will begin. However, the ultimate period will operate unless it is suspended. We recommend that the ultimate period be suspended during any period of time that the defendant wilfully and knowingly conceals facts material to a claimant's claim.

Agreement; Acknowledgement and Part Payment

Chapter 8 is devoted to agreements of persons varying limitation provisions as between themselves, and to the doctrines of acknowledgement and part payment. We recommend that agreements be permitted in accordance with normal contract law. Our recommendation with respect to acknowledgements and part payments is not designed to change the law as it exists under the present Alberta Act. Rather, it attempts to restate that law in a more organized and comprehensible manner, and hence to clarify it.

Draft Legislation

Part IV of this report contains a Draft Limitations Act based on our recommendations.

PART II. REPORT FOR DISCUSSION: LIMITATIONS

CHAPTER 1. INTRODUCTION

A. Background for Report

(1) Purpose of report

1.1 Every civilized judicial system with which we are familiar imposes time limits within which judicial remedies must be sought; the system of rules through which it does so is known as a "limitations system." The purpose of this report is to identify and to analyze the policy considerations upon which a limitations system should be based and to derive from that analysis a limitations system which will be as fair and as easily comprehensible as the subject matter permits. This is a Report for Discussion, and all of the recommendations contained in it are tentative. We have assembled our recommendations into a Draft Limitations Act which is included as Part IV of this report. We emphasize, however, that this is *not* a Proposed Act for two important reasons: (1) it is merely a collection of recommendations which are tentative, and (2) these recommendations were neither written nor reviewed by a trained legislative draftsman.

(2) Origin of Limitation of Actions Act (Alberta)

1.2 The Limitation Act, 1623 (U.K.),[1] was the first relatively comprehensive English limitations act. This statute of James 1, and several other English limitations statutes,[2] were consolidated, modernized and combined with some new initiatives to form the Uniform Limitation of Actions Act (hereafter the "1931 Uniform Act"), which was adopted by the Conference of Commissioners on Uniformity of Legislation in Canada (now the Uniform Law Conference of Canada) in 1931. The Limitation of Actions Act[3] (hereafter the "present Alberta Act"), which is based on the 1931 Uniform Act, was enacted in 1935.[4] With minor local variations, the 1931 Uniform Act is also currently in force in Manitoba,[5] Prince Edward Island,[6] Saskatchewan,[7] the Yukon Territory[8] and the Northwest Territories.[9]

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[1] 21 Jac. 1, c. 16.

[2] The most notable of these were the Real Property Limitation Acts of 1833 (3 & 4 Will. 4, cs.27 and 42), 1837 (7 Will. 4

1.3 The most significant amendments to the present Alberta Act, made in 1966,[10] eliminated certain short limitation periods and consolidated a number of limitation provisions formerly found in other statutes into the present Alberta Act. Although the 1931 Uniform Act, and hence the present Alberta Act, significantly improved the limitations system embodied in their predecessor English statutes, the modern Canadian acts remain based on a limitations strategy formulated in England over three

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[2](cont'd) & 1 Vict., c. 28),and 1874 (37 & 38 Vict., c. 57). A complete list is given by the Ontario Law Reform Commission, *Report on Limitation of Actions*, 11 (1969).

[3] R.S.A. 1980, c. L-15.

[4] S.A. 1935, c. 8.

[5] The Limitation of Actions Act, C.C.S.M., c. L150.

[6] Statute of Limitations, R.S.P.E.I. 1974, c. S-7.

[7] The Limitation of Actions Act, R.S.S. 1978, c. L-15.

[8] Limitation of Actions Ordinance, R.O.Y.T. 1978, c. L-7.

[9] Limitation of Actions Ordinance, R.O.N.W.T. 1974, c. L-6.

[10] An Act to Amend the Law Respecting Limitation of Actions in Tort, S.A. 1966, c. 49.

hundred years ago.

(3) Current reform movement

1.4 The limitations statutes in much of the common law world have been seen as defective, and during the twentieth century a reform movement has occurred which has resulted in a number of significant reform reports and new statutes. We have benefitted greatly from these reports and statutes, and we will refer to many of them in this report. In order to facilitate this reference process, and to eliminate repetitive footnotes, we have included a Table of Abbreviated References in this report immediately following the Table of Contents. This Table, which is organized by jurisdiction, contains a formal reference to the report or statute in the left column, and an abbreviated reference in the right column which we will use when making references in this report.

1.5 The Uniform Law Conference of Canada adopted and recommended a new act, the Uniform Limitations Act (hereafter the "1982 Uniform Act") in 1982. As yet no jurisdiction has enacted the 1982 Uniform Act.

(4) History of project

1.6 The Institute's project on limitations law may be viewed as part of the current reform movement discussed above. Our project began in the mid-1970s, and a Working Paper on Limitation of Actions (hereafter the "Institute Working Paper") was issued in June 1977. The Institute considered the Alberta Act as both obsolete and unduly complex, and in need of reform. All of the recommendations in the Institute Working Paper were, of course, tentative. Since 1977 we have continued our work on limitations law, but progress has been slow, primarily because of a shortage of legal staff personnel relative to other major projects of the Institute. Our delay, however, has turned out to have been advantageous. It has given us an opportunity to monitor the experiences of jurisdictions which have recently enacted reforming limitations statutes and time to allow our recommendations to evolve. The successful experimentation of other jurisdictions, and our own research and analysis, have led us to the conclusion that the time is now ripe for somewhat bolder reforming measures. Because our recommendations are relatively bold, this report is issued as a Report for Discussion, a title which we now use in place of Working Paper. However, the purpose remains the same. All of the recommendations in this report are tentative. This report is designed to stimulate discussion and to elicit constructive comments.

B. Legal, Judicial and Limitations Systems

1.7 In our study of limitations law we have attempted a fundamental evaluation of the objectives of a limitations system, of the reasons for such a system, and of the methods available for realizing the objectives of such a system. This process has required us to consider the relationship of a limitations system to the judicial system, and, indeed, of the relationship of these systems to the broader legal system. Some very basic legal concepts are involved, and although we certainly do not wish to delve too deeply into jurisprudence, we do believe that these basic concepts can assist us in simplifying limitations law and that for this reason they merit our attention.

(1) Legal system

1.8 The foundation or substantive base of our legal system is a network of what are often referred to as primary right-duty relationships. For every right enjoyed by one person one or more other persons are subject to a correlative duty. Indeed, the existence of a right depends on the correlative duty of one or more other persons to respect that right. Insofar as these right-duty relationships are concerned, every individual is a person, and so are such legal entities as corporations and the Crown.

1.9 These right-duty relationships are usually based on personal status, contract, trust, restitution, property or statute. When the legal system recognizes a right of one person, it may impose the correlative duty upon one person, upon a group of persons, or upon all persons. For example, the personal status based on marriage results in a right-duty relationship only between the spouses. But one's personal status as a child will produce a broader series of right-duty relationships: between the child and his parents, his siblings, and often other relatives. The right-duty relationship based on a contract or a trust will only impose duties upon those persons who have undertaken the duties. But one's rights respecting bodily integrity and reputation, which are based on personal human status, and rights based on property ownership, result in the imposition of duties upon everyone whose conduct could violate those rights.

1.10 The mere recognition of a right by the legal system is usually enough to ensure that it will be respected by those persons with a duty to respect it. Contract rights and the rights of trust beneficiaries are customarily secure because the parties to a contract and trustees usually perform the duties they have assumed. The right of every person not to be physically harmed is seldom infringed in a society in which basic human rights are respected. Similarly, most persons comply with their duties to refrain from violating the property rights of others; our homes are not often invaded and our possessions are not often stolen. This general observance of rights reflects a broad political consensus as to the merits of the fundamental principles upon which our legal system is based.

(2) Judicial system

1.11 Unfortunately, the fact that most persons voluntarily comply with most of their legal duties most of the time does not provide sufficient protection for legal rights. The need for the protection of rights is, in anything but a totalitarian society, one of the principal reasons why persons organize themselves into political states. Thus the objective of the judicial system is to protect the legal rights recognized by our legal system by providing judicial remedies when those rights are infringed.

1.12 The judicial system is comprised of two subsystems: the criminal law system and the civil law system. Most criminal conduct violates legal rights, and punishments inflicted under the criminal law are designed to protect legal rights. However, as criminal proceedings are brought by the Crown, rather than by private persons, the criminal law is not within the scope of this report. Rather, in this report we are concerned with the civil law side of the judicial system.

1.13 Although legal rights arise by virtue of the legal system, their recognition and ultimate enforcement depends upon claims being brought before the courts within the judicial system. Functionally, a court is usually engaged in three distinct processes in a civil proceeding.

(a) Declarations

1.14 Whenever one brings a claim before a court he must allege the existence of facts which create a right-duty relationship; the claimant must assert, either expressly or impliedly, a right on his part and a correlative duty on the part of the defendant. Occasionally only the existence or extent of a claimed right-duty relationship may be in dispute in a case, and if so, the claim will only request a judicial declaration recognizing and defining the terms of the relationship. For example, a claimant may request a judicial interpretation of the meaning of certain provisions in a contract which he and the defendant have made, only in order to have their contractual right-duty relationship clarified. This may be all that either of the parties desires; they may leave the court in peace and comply with their respective contractual duties as defined in the judicial declaration. We do not believe that mere claims for judicial declarations defining right-duty relationships have ever been intended to be subject to a limitations system, and we do not believe that they should be. A judicial declaration, with nothing more, does not give a claimant a judicial remedy for it does not order the defendant to do anything. The subject of judicial declarations will be examined more fully in Chapter 3, and we will make our recommendation there. We have mentioned claims for judicial declarations in this introductory chapter in order to distinguish them from the claims which are crucial to a limitations system: those requesting judicial remedies.

(b) Remedial orders

1.15 Usually, however, a claimant will request more than a mere declaration of his right-duty relationship with the defendant. As we have stated, a claimant must establish that such a relationship exists. But in most cases he will also allege that the defendant under the claim breached a duty owed to him, and he will request one or more judicial remedies. The court must then determine whether or not the defendant breached a duty owed to the claimant, and if he did, it may grant the claimant an appropriate remedy. The court may or may not expressly declare the right which the defendant infringed, but by granting a remedy the court will by necessary implication recognize the existence of a right-duty relationship sufficient to justify the remedy.

1.16 Although courts are empowered to select from an extensive and varied arsenal of remedies, these remedies can conveniently be divided into two categories: (1) performance oriented remedies and (2) substitutionary remedies. In the following examples, and in examples throughout this report when there is only one claim, we will use the letters "C" and "D" to designate, respectively, the claimant and the defendant under the claim. Assume that D contracted to sell Blackacre to C and to transfer title to C on February 15th, that C tendered the purchase price as required, and that D breached the contract. The court might grant a remedial order directing D to perform the contract and thus to comply with his original duty, albeit at a later date. This remedy, called specific performance, is a performance oriented remedy. As well, the court might order D to pay a sum of money to C as damages for failing to comply with his contractual duty to perform the contract on February 15th. This is a substitutionary remedy; it compensates C for the violation of his right to have the contract performed on Feburary 15th when that is no longer possible. Or, the court might only grant a remedial order directing D to pay money to C as damages for breach of the contract. This too would be a substitutionary remedy. Assume that D intentionally assaulted C on February 15th. The court would probably order D to pay a sum of money to C as damages, as compensation for the violation of C's right not to be assaulted on February 15th. This is a substitutionary remedy.

1.17 The foregoing examples demonstrate that when a court exercises its power to grant a remedial order, it creates a new right-duty relationship between the parties. The defendant's new duties will differ, to some extent, from those he previously had. If a defendant had a duty, either to do something (to perform a contract on February 15th), or to refrain from doing something (assaulting C on February 15th), that duty existed at a specific point in time. When a defendant breaches a duty he can no longer comply with that precise duty, and he assumes a liability to have new duties imposed on him through a judicial remedial order. Although we may usefully refer to some remedial orders as performance oriented, they are all substitutionary, for the claimant's new rights will differ to some degree from those the legal system formerly recognized. Nevertheless, when a court grants a remedial order conferring altered rights on a claimant, and directing a defendant to comply with his correlative duties, it activates a judicial mechanism designed to protect legal rights insofar as that is reasonably possible. Granting civil judicial remedies is one of the most important functions of the courts under the judicial system, and the application of a limitations system to claims for civil judicial remedies is the subject of this report.

(c) Enforcement orders

1.18 By granting a remedial order a court can confer new rights on a claimant which will place him, insofar as possible, in as good a position as he was before the defendant infringed his former rights. However, although the remedial order will direct the defendant to comply with what will then be judicially imposed new duties, the remedial order will not be self-executing. In the examples presented above, the remedial order will neither transfer ownership and possession of Blackacre to C nor place the money D was ordered to pay C as damages into C's pocket. Defendants who are able to comply with remedial orders usually do so, but even this is not always the case; an able defendant may remain obdurate.

1.19 A court may be required to issue such further orders and writs as may be required to enforce the remedial order granted. Such enforcement orders would include a writ of execution, a writ of possession, a garnishee summons, and an order directing an official of the court to execute a document on behalf of a defendant. We do not believe that claims for enforcement orders should be subject to a limitations system. Our basic reason is that the objective of a limitations system is to ensure that claims requesting remedial orders are brought within an appropriate limitation period, and an enforcement order could not be granted in support of a remedial order unless the claim requesting the remedial order satisfied the requirements of the limitations system. The subject of enforcement orders will be discussed more fully in Chapter 3 and we will make our recommendations there.

(3) Limitations system

1.20 We have said that the objective of the judicial system is to protect the legal rights recognized by our legal system by providing judicial remedies when those rights are infringed. It necessarily follows that the judicial system must give a claimant an adequate opportunity to bring a claim for the recognition of a right and for a judicial remedy for its infringement.

1.21 The objective of a limitations system, which is, of course, part of a judicial system, is to encourage the timely resolution of legal controversies. Operationally, it achieves this objective by limiting the time available to a claimant for bringing a claim seeking a judicial remedy. If a claim is not brought within the applicable limitation period, the defendant is, upon his request, given a defence to the claim. This defence does not, like most defences available to a defendant under the judicial system, challenge a claim on its merits. It gives the defendant complete immunity from any liability under a claim, regardless of the merits of that claim, and consequently it negates a court's power to impose a new right-duty relationship on the parties.

1.22 A limitations system will inevitably prevent some claimants from having the validity of their claims adjudicated on the merits. Moreover, without doubt some of these claims will be meritorious. In the result, the legal rights of some claimants will not have been protected and the judicial system will not have fully achieved its objective. For this reason limitations systems are often viewed with distaste. They are frequently seen as giving a defendant a technical shield against a meritorious claim. Assuming the claim was meritorious, the injustice is perceived as most extreme in cases in which the claimant, although diligent within the limits of his ability, could not discover enough of the relevant facts to permit him to bring a timely claim. When one focuses on the operation of a limitations system in terms of a specific case, one can readily feel that the claimant should have his day in court and that limitations systems are unconscionable. We believe that this attitude towards limitations systems reflects an incomplete appreciation of the goals of the judicial system.

1.23 To be sure, permitting the adjudication of claims on the merits is an objective of the judicial system. But the judicial system must also ensure that, insofar as possible, the adjudicative process operates fairly for both the defendant and the claimant. Most of a person's daily conduct is quite privileged; it does not infringe anyone's rights. The fact that a claimant alleges that he had a right which was violated by the defendant does not make it so. We emphasize that there is a tendency in considering a limitations system to focus on the meritorious claim which would succeed but for that system. This is sometimes referred to as "the fallacy of the meritorious claim". Many claims are not meritorious, and the judicial system must be designed to give both the defendant and the claimant an equal opportunity to litigate a claim on the merits. We mean no criticism of the courts when we acknowledge that the judicial system is a human system; it is fallible. It has the potential for granting a claimant a remedial order when he either had no right or the right which he had was not violated by the defendant. A claim must allege some conduct on the part of the defendant; it may allege that the defendant's conduct was relevant to the creation of the claimant's alleged right, and it must allege that some conduct of the defendant violated that right. We believe that the longer the gap in time between the defendant's alleged conduct and the trial of the claim on the merits, the more vulnerable the defendant will be to a spurious claim. We will elaborate on our reasons for this conclusion when we consider, in more detail, the reasons for a limitations system.

1.24 Before analyzing the reasons for a limitations system we wish to underscore a caution which anyone debating the adequacy of a particular limitations system should heed. Although we continually speak of claimants and defendants, as though our society could be divided into these two classes of persons, that is manifestly not so. We are all potential claimants and potential defendants. We can and will identify groups of persons who, because they routinely render services to scores of persons when practicing their vocations or professions, are particularly vulnerable to the injustice that can flow from the adjudication of a stale claim. To use an example close to home, this report reflects the opinions and recommendations of the Board of Directors of the Institute. We are all lawyers, and we know through experience how difficult it is to defend a claim brought so many years after the alleged conduct that no one in the firm can even remember the client. But, we have also all been clients of lawyers, and hence potential claimants. Viewed from the perspective of an entire society, public policy demands that a limitations system afford equal justice to claimants and defendants.

1.25 Every judicial system with which we are familiar incorporates a limitations system. Many different reasons are advanced in support of such a system, and we will attempt a relatively thorough analysis of these reasons. We do not propose simply to accept these reasons as part of received wisdom. We believe that a properly conceived limitations system should reflect the nature of each supporting reason and the weight, in terms of importance, which should be given to it. Moreover, we believe it is important to recognize that, because of the extensive changes which have occurred in our society, the evaluation of these reasons which is reflected in the present Alberta Act, adopted in 1935, may not be adequate today, and may be less so in the years to come. We have organized the reasons advanced in support of a limitations system into categories.

(a) Evidentiary reasons

1.26 When a claimant brings a claim requesting a judicial remedy he must allege that he had a right and that some conduct, some acts or omissions of the defendant, violated that right. Whether or not the claimant's allegations are true depends on the facts of the case, and the court can only adjudicate the issues raised by the claim upon the basis of evidence introduced by the parties sufficient to prove the relevant facts. The conduct, transactions or events upon which the claim is based will have occurred either at some point in time or over some period of time, and with the passage of time the evidence of what actually happened will deteriorate.

(i) Deterioration of evidence

1.27 A witness's evidence of events perceived through his senses depends on his memory, and testimony based on human memory becomes less reliable as time passes. Over time witnesses die, causing the loss of evidence, or leave the jurisdiction in which the case is being tried, making it more difficult and more expensive to obtain evidence. Because our population is becoming increasingly mobile, primarily for reasons based on the location of employment opportunities and retirement choices, it can be predicted that this latter problem will become more serious than it was formerly.

1.28 Written records tend to be more durable than memories, and because rapid technological improvements based on microfilm and computers have tremendously increased our capacity to organize, store and retrieve records, we have developed what many persons call an information oriented society. We can predict that documentary evidence will become increasingly available for judicial purposes in the future, at least for a period of a few years after the occurrence of the relevant events. This factor could decrease the historic problems associated with the loss of evidence, and could support a generalized conclusion that, insofar as reasons based on evidence are concerned, the length of the limitation periods of a limitations system could be extended. We would not, however, press this conclusion too far. Written records must still be authenticated by witnesses, and because these records will not supply all of the relevant facts and because they may contain erroneous facts, they will have to be supplemented with the oral evidence of witnesses. Moreover, because, as a society, we now store such a mass of routine information, it is quite possible that records will be found to have outlived their usefulness sooner, and will be destroyed at periodic intervals for reasons based on cost-benefits analysis. In short, more documentary evidence may be available for judicial purposes for a period of a few years after the relevant events, and less thereafter.

(ii) Advantage to claimant

1.29 Problems associated with the proof of facts after evidence has deteriorated plague both claimants and defendants, and if this is so, one should question why a limitations system is needed for the protection of defendants. The answer is that the experience of those familiar with the litigation process has demonstrated that defendants are more vulnerable to deteriorated evidence than are claimants. There are several reasons why this is so.

1.30 We have stated that every member of our society is a potential defendant, for many of our daily activities involve interaction with others which could result in the violation of someone's rights. Not infrequently a person will be quite unaware of which precise act or omission of his might constitute a breach of duty owed to someone else. In the course of their occupations many persons are regularly engaged in providing goods and services for others, and these persons in particular have no effective means of predicting which person from a relatively large class of persons will bring a remedial claim. The manufacturer who warrants the quality of his products will often be unaware that a defective product for which he is responsible has even entered the stream of commerce. Persons in the professions, such as architects, doctors, nurses, engineers, lawyers and surveyors, regularly perform services for many others. Many professional persons will be required to defend themselves against a claim based on negligence at some point in their careers, and because negligent acts are basically careless acts, it is unlikely that these persons will have any conscious perception at the time that a particular service is performed that it will subsequently be alleged to have been performed negligently. Many persons, and particularly persons who are in the business of providing goods and services for others, routinely keep records of their activities. However, if one is unaware of a specific claim against him he is unlikely to keep the records which would be relevant to that claim for many years. It is defendants who will most likely destroy records periodically. If a defendant has no knowledge of a claim he will certainly not go to the expense of developing a defensive file; he will not obtain statements and affidavits from potential witnesses. The surprised defendant will usually have difficulty in even reconstructing the circumstances under which he allegedly breached a duty owed to the claimant. Even a defendant who suspects that a claim might be brought against him will often not have enough knowledge to enable him to assess the risks involved in the claim, and he will be in a dilemma as to how much effort and expense, if any, he should allocate to developing a defensive file.

1.31 The claimant will usually have a distinct advantage. It is he who will have sustained the harm, and for that reason alone may have a better recollection of the facts. If the claimant is a customer or a client of a defendant who provides goods or services to many people, it is probable that the circumstances will be more memorable to the claimant. If the claimant is more familiar with the circumstances surrounding the defendant's alleged breach of duty, he will probably be able to give more elaborate and convincing evidence, even if he resists the temptation to shade the story to his benefit. We would be naive to fail to recognize that, if one party has little evidence, the other party can fabricate evidence with less likelihood of detection. The claimant's greatest advantage derives from his position, for he controls the timing of his claim. Subject to the constraints imposed by a limitations system, he can delay bringing his claim as long as that course suits his convenience. The claimant can thus hold back his claim, while not only preserving his evidence, but augmenting it by collecting statements, affidavits and documents, while the defendant's evidence is deteriorating.

(iii) Impact on judicial system

1.32 We have discussed two factors with respect to evidence. In the typical case, with the passing of time (1) the evidence available to both the claimant and the defendant will have deteriorated, and (2) the defendant will have suffered a greater loss of evidence. Because of the manner in which the civil law system operates, these two factors have a serious adverse effect on the ability of the judicial system to do justice. The civil law system is an adversarial system. The claimant must allege and prove a set of facts which, if they were the only relevant facts, would establish that he had a right and that the defendant's conduct breached his correlative duty. Two points must be emphasized. First, there may be other relevant facts which establish either that the claimant did not have the right he alleged, or that the defendant's conduct did not violate that right even if it existed. Under the civil law adversarial system, the defendant must allege and prove these facts. Secondly, although the claimant must introduce competent and believable evidence adequate to support each of his factual allegations, there is no requirement that his evidence must satisfy some independent standard of judicial sufficiency. The court has no light meter available to measure the sufficiency of the claimant's evidence relative to an independent standard based on probability; the court cannot wait for the green light to show up. Rather, the court must decide the case on the strength of the claimant's evidence relative to that produced by the defendant. If the defendant has little or no evidence on a factual issue, and the claimant has slightly more believable evidence, however shallow, the balance tips to the claimant on that issue. In short, with each passing year after the relevant events occurred the evidence is likely to have deteriorated further, the court will have to decide the case on evidence which discloses a dimmer shadow of the actual events, and the shadow will probably increasingly favor the claimant. A point in time will be reached at which the claimant may prevail and obtain a judicial remedy because, on balance, he produced the best evidence, even though the total evidence was far less satisfactory than the court would have liked. When evidence has become so incomplete and unreliable that it is unlikely to furnish a sound basis for a judicial decision, the process of adjudication has become more like a game of chance. At this point the "game" should be called for lack of light.

(b) Reasons based on peace and repose

1.33 A statute of limitations has frequently been called "an Act of Peace" and "a statute of repose". The reasons for a limitations system which we will now discuss are related to this theme of peace and repose.

(i) Societal peace

1.34 We believe that a society must secure as much peace as it reasonably can, and that it can quite properly focus its primary attention on resolving present conflicts. Our society provides an elaborate and extremely expensive judicial system to assist its members in the orderly resolution of conflicts. We believe that it should shelter that system from old conflicts which could reasonably have been submitted for litigation in the past. A society can still old conflicts by denying access to its courts to claimants who wish to keep them alive. Broadly speaking, there must be a time when, insofar as human transgressions are concerned, the slate is wiped clean. A reasonable limitations system can secure this objective.

(ii) Individual peace

1.35 Our legal system defines what acts or omissions of a person constitute the breach of a duty owed to someone else. Often conduct which results in a breach of duty is not wrongful in any moral sense. Nevertheless, the opposite is more frequently true. If a defendant's conduct may have breached a duty owed to the claimant, we believe that he is entitled to have that legal issue resolved in a timely manner; he deserves peace of mind as soon as is reasonably possible.

(c) Economic reasons

(i) Individual financial mobility

1.36 A defendant who knows that there is an outstanding claim against him may have reasonable grounds for disputing the validity of the claim. Even if the validity of the claim is undisputed, the amount of the defendant's potential liability under the claim may be uncertain. If the defendant's potential liability is significant, until these legal issues are resolved he may be reluctant to make new business commitments, and his ability to induce others to enter into transactions with him may be adversely affected. Moreover, because the defendant's practical power to manage his affairs effectively is inhibited while a credible claim exists against him, he will be vulnerable to exploitation by a claimant who threatens, but delays bringing a claim to court. By delay a claimant can sometimes coerce the defendant to pay an excessive amount to settle a doubtful claim in order to extricate himself from a position of relative business immobility.

(ii) Economic costs

1.37 We have emphasized that every member of our society is a potential defendant, and that persons who are regularly engaged in providing goods or services for others in the course of their occupations are particularly vulnerable to remedial claims. Persons in the latter category accept this vulnerability as an occupational risk. These persons generally create and preserve some written records of their activities, and they generally obtain liability insurance. These persons are usually able to pass on the costs of records maintenance and insurance to the consuming public. Within a decade after the occurrence of the events upon which a given group of claims is based, the overwhelming majority of these claims will be either abandoned, settled or litigated. At this point the result of peace denied can quickly become excessive cost incurred, for the cost burden imposed on potential defendants, and through them on society, of maintaining records and insurance to protect themselves from a few possible claims is extremely high relative to the realistic risks. A reasonable limitations system can relieve the society of a cost burden which simply is not justified in terms of the benefits which would be conferred on a tiny group of claimants by keeping defendants vulnerable to claims.

(d) Judgmental reasons

1.38 In paragraph 1.23 we stated that the judicial system is fallible because it is a human system; it has the potential for granting a claimant a remedial order which is not deserved. We believe that this risk increases as evidence deteriorates over time, for the accuracy of a judge's factual determinations depends on the adequacy of the evidence available to prove the true facts. It is argued that the risk of an undeserved remedial order increases with the passing of time for another distinct reason. Judges must also decide questions of law, and the basic legal issue in any case is whether or not the claimant had a right that the defendant do, or refrain from doing, something. Even if the parties agree on the facts, this legal issue remains. In paragraph 1.8 we said that the foundation of our legal system is a network of right-duty relationships. Now we must point out an additional relevant factor. Our law is continually evolving, primarily through adjustments to this right-duty network required to ensure that the law adequately reflects current socio-economic values. The faster a society's cultural values change, the faster its law must change, even if the law always remains, to some extent, in the wake of progress. Sociologists tell us that cultural values in Canada have changed significantly in the 40 years since the end of World War II, and the right-duty network at the base of our legal system has evolved accordingly. This means that some conduct which was quite privileged 40 years ago, conduct which infringed no recognized rights of others then, would constitute a breach of duty if it occurred today. The problem is that a judge must decide whether or not a claimant had a right in accordance with the law as it existed at the time of the conduct in question. If the alleged right is based on legislation, it is unlikely that the court will be faced with a judgmental issue. The right will have been created when the legislation became effective, and if the legislation has retroactive effect that will be stated. However, many alterations in the right-duty network are accomplished by the courts, for judges frequently make new law in deciding cases. The problem under consideration is perhaps most severe in the context of negligence cases, for whether or not a defendant's conduct was negligent depends on the extent of the duty of care the law imposed on him. It is one thing for a judge to decide that the claimant had a right that the defendant not behave as he did one year ago; the judge can make that value judgment in accordance with the current cultural values of his generation. But what if the conduct occurred 40 years ago? It is quite another thing for the judicial system to ask judges, and sometimes members of a jury, to judge the reasonableness of conduct through the eyes of their grandparents. The argument is that humans, and hence the judicial system, lack the capability to do this fairly, that the attempt is as likely to lead to injustice as justice, and that a limitations system should shield the judicial system from this improper burden at some point in time.

1.39 It is difficult to appraise the importance of the foregoing argument. As we do not believe that it would be relevant to many cases, we are not inclined to stress it. However, we believe that the relative inability of one generation to judge the reasonableness of conduct of members of an older generation could lead to injustice in some cases, and that this provides credible support for a limitations system.

(e) Reasons based on magnitude of damage

1.40 Our legal system, and hence our judicial system, is currently faced with what some would call a new problem. It is a new problem not because of anything in its inherent nature, but because of the enormous liability it can impose on a defendant. Over the centuries humans have been, and still are, vulnerable to natural disasters, such as hurricanes, tornadoes and earthquakes. Humans have now developed the technological capacity to create their own unnatural disasters. The problem for the legal system is the magnitude of the damage which can result from a disaster which is caused by human conduct which breached a duty owed to others.

1.41 We can draw from common knowledge some examples of the disasters that humans can create.

(1) A train carrying explosive materials can derail, ignite, and devastate an entire town.

(2) A dam can give way and destroy an entire city.

(3) A nuclear power plant can overheat, explode, and drench thousands of square kilometers with toxic radioactive material.

(4) A chemical storage facility can leak enough poisonous gas to kill or permanently injure thousands of people.

(5) A drug administered to pregnant women can result in the birth of thousands of children with serious birth defects.

(6) An insulation material which emits carcinogenic fumes

can render thousands of homes and other buildings uninhabitable.

1.42 It is argued that, because of the sheer magnitude of the losses which can result from these man-made disasters, (1) the legal system cannot adequately cope with them, and (2) a limitations system can be used to constrain their impact on the legal system. The first point is that the legal system cannot adequately cope with these disasters. This is probably true. A judge can grant money judgments directing a defendant to pay huge damages to hundreds of claimants to compensate them for the injuries they suffered in a disaster, but he cannot print the money required to make the payments. The defendant who is legally responsible for such a disaster will seldom have the financial resources, even when bolstered with massive liability insurance, to pay more than token fractions of the money judgments awarded. This reflects the insufficient strength of a private economic system, not a defect in the legal system. However, there is also an inherent disadvantage in the legal system, for the legal costs involved in the litigation required to produce the money judgments will frequently consume a significant percentage of the money which would otherwise be available for payments. In its broadest terms, the proposition is that, because the legal system is both inefficient and unable to provide adequate remedies, man-made disasters should be withdrawn from the legal system and left to the political system. In the result, these disasters would be treated as natural disasters and any compensation received by victims would have to come from either private charities or governments. Consideration of this broad proposition is beyond the scope of this report. We have mentioned it only because of the subsidiary proposition that a limitations system can be used to screen some of these disasters from the legal system.

1.43 We will state our conclusion as to this subsidiary proposition at the outset. Even if withdrawing man-made disasters from the legal system were sound public policy, we do not believe that a limitations system should be used to promote this objective. Our reason is that a limitations system would operate too capriciously to be either effective or fair.

1.44 Consider examples (1) and (2) in paragraph 1.41. Most of the damage would have occurred at the time of the train wreck and the collapse of the dam, and both the damage and a defendant who might have been responsible for it would likely have been discovered shortly thereafter. Thus it is probable that most of the claims which would arise from these events could be brought well within anything but a draconically short limitation period. Hence a limitations system could not effectively shield the legal system from the consequences of these disasters. Examples (3) through (6) in paragraph 1.41 do not yield such a simple answer. In some instances the damage might occur at the time of the alleged wrongful conduct and in other instances not until many years later. The time when claimants might reasonably discover either their harm or defendants possibly responsible for it could vary over a period of many years. Although most claims could probably be brought within a reasonable limitation period, many probably could not. Thus a limitations system could not block all claims resulting from a man-made disaster, and the extent to which it did achieve this goal would depend on chance.

1.45 Nevertheless, a limitations system will supply a defence against many claims resulting from man-made disasters, even if that is not an independent reason for such a system. Consider examples (3) through (6). In all of them our scientific society has developed a highly toxic material at one point in time, but too often has not discovered just how toxic it was until years and even decades later. When this happens we are often faced with a multitude of persons in need of compensation for frightful injuries resulting from disastrous events for which a single defendant may be legally responsible. This situation imposes extreme pressure on a limitations system because of the fallacy of the meritorious claimant. The fact that hundreds of persons need remedies does not mean that the judicial system can justly provide them. The judicial system should only provide remedies if it can be determined, in a just civil proceeding, that the defendant is legally responsible for the disaster. Both the evidentiary and judgmental reasons supporting a limitations system demonstrate that a court cannot fairly adjudicate a controversy many years after the occurrence of the events in issue. When evidence has so deteriorated that it ceases to be reliable, and when human ability to judge the reasonableness of past conduct has seriously diminished, society must insist that a court stay its hand. In the final analysis the ability of the judicial system to give a claimant his day in court depends on the capacity of the system to give both parties a fair day in court. When a court's capacity to adjudicate fairly is exhausted, the presence of scores of claimants, rather than one, makes the reality more tragic, but it does not give the court renewed vitality.

1.46 The reasons for a limitations system based on peace and repose, and the economic reasons for such a system, remain applicable to the man-made disaster situation. Indeed, one economic reason will be particularly relevant. Without an effective limitations system, countless potential defendants will be forced to maintain large liability insurance policies for a prolonged period of time, and the cost of this will ultimately be borne by the entire society. This cost will be most futile in the disaster situation where there may be hundreds of victims and only one legally responsible defendant. Only one insurance policy will be available anyway, and it will probably be hopelessly inadequate even if very large.

1.47 A limitations system will withdraw many claims based on man-made disasters from the legal system, and when this happens victims will be forced to appeal to private charities and to governments. We do not believe that a limitations system should be designed to produce this result because of the extraordinary magnitude of the damage which will be caused by such a disaster. Rather, this result will be an inevitable consequence of a limitations system required for other reasons of public policy.

(f) Summary

1.48 Although we have analyzed the various reasons for a limitations system in discrete categories, having done so we believe that all of the reasons we have considered lead us to the same two general conclusions. (1) All claims should be brought as soon as reasonably possible. However, the objectives of a limitations system can be achieved without the imposition of an unduly short limitation period on a claim. With respect to the limitation period normally applicable to a claim, "unduly short" can safely be judged with leniency to claimants. (2) An absolute or ultimate limitation period applicable to all claims, one which is not subject to uncontrolled exceptions and which is not unduly long, is required to achieve the objectives of a limitations system. With respect to this period, "unduly long" must be judged to ensure fairness to defendants.

1.49 These two general conclusions can serve us as guidelines for the development of a modern limitations system, but they will not make the specific value judgments which are required. A limitations system must give claimants a reasonable period of time after the occurrence of events to discover whether or not their rights have been violated by the conduct of others, to negotiate settlements and, if need be, to seek remedies. At the same time the limitations system must require that claims be brought within a period of time which is reasonable in terms of the interests of both society and defendants. In particular, it must not tolerate an excessive risk that claimants advancing stale claims will obtain remedies when their rights have not been violated by defendants who have lost the capacity to defend themselves. Obviously, the limitations system must strike an appropriate balance.

1.50 There is, unfortunately, no way to determine how to strike this balance with scientific accuracy. The judgments required must be based on experience, and experience will often support divergent opinions. It is essential that we recognize that a judicial system will never operate perfectly and that it will on occasion produce injustice. In making the judgments required to fashion a limitations system, all that can be done is to be mindful of the injustice which will be done to either claimants or defendants by an improper balance, and to attempt to strike the balance which will achieve the most justice with the least injustice.

C. Objectives for Reform

1.51 We have developed some general objectives, or principles, which we will use in developing the specific recommendations we will make subsequently in this report. Because of their importance we will state them here. A new Alberta Limitations Act should be based on these principles.

(1) Fairness. The Act should strike as fair a balance between the interests of claimants and defendants as is possible.

(2) Comprehensiveness. The primary element in the Alberta limitations system should be an Act which includes, insofar as feasible, all limitation provisions in force in Alberta.

(3) Comprehensibility. The Act should be as comprehensible as possible for all persons, laymen and lawyers, who will be affected by it.

(4) Unambiguous. Each provision of the Act should, insofar as possible, express its purpose, scope and method of operation clearly.

(5) Organization. The provisions of the Act should be organized in a logical sequence in order to enhance their clarity and to eliminate redundancy.

(6) Plain language. The Act should be drafted in contemporary plain language.

(7) Simple. The Act should contain provisions expressing fundamental principles designed to be applicable in most cases, and it should not be burdened with technical solutions for rare cases.

D. Options for Reform

1.52 We have considered several different approaches we might take in order to achieve the objectives for reform we have just stated through a modern limitations act. We concluded that we had four viable options. We could recommend the use of any one of three current acts, with such amendments as we deemed beneficial. Or, we could recommend a completely new statute. The three current acts we considered most actively are: the present Alberta Act, the 1982 Uniform Act and the British Columbia Limitation Act (hereafter the "B.C. Act") enacted in 1975.

1.53 The present Alberta Act is based on the 1931 Uniform Act. That Act was completely revised by the 1982 Uniform Act. Indeed, the 1982 Uniform Act is largely based on a report prepared by the Alberta Commissioners to the Uniform Law Conference. As we believe that the 1982 Uniform Act is a significant improvement over the present Alberta Act, as between these two Acts, we would use the 1982 Uniform Act as our starting point.

1.54 However, we believe that the B.C. Act is an even more modern model. It is shorter, it is relatively well organized and drafted, and it accomplishes, from a substantive point of view, what is required. Although the B.C. Act was enacted in 1975, and the Uniform Act was not adopted until 1982, the B.C. Act is based on the *Report on Limitations; Part 2 General* of the Law Reform Commission of British Columbia, issued in 1974 (hereafter the "B.C. Report"), and that Commission had access to the report of the Alberta Commissioners on which the 1982 Uniform Act is based. We have included the B.C. Act as Appendix A of this report.

1.55 We believe that the best course is for us to recommend a completely new limitations statute, which incorporates ideas from our own deliberations, from the 1982 Uniform Act, from the B.C. Act, and from many other modern limitation provisions enacted in common law jurisdictions. In paragraph 1.6 we said that our recommendations are relatively bold. They are no more than that and it would be misleading if any stronger language were used. The recommendations which we tentatively make in 1986 are no bolder than was the B.C. Act first proposed in the B.C. Report in 1974. Our recommendations simply reflect a continuing law reform process; they build on the experiments and experiences of other jurisdictions.

CHAPTER 2. LIMITATION PERIODS

A. The Fundamental Problem

2.1 A limitations system is fairly conceived if it gives a claimant a reasonable time - and no more - in which to discover an infringement of his rights and to bring a claim for a remedy. Unfortunately, a fundamental problem impedes attempts to formulate a statutory method for the measurement of this reasonable time. This problem can be more readily understood if we first describe the times which are relevant to a limitations system: (1) the time when the breach of duty occurred, (2) the time when the remedial claim accrued, (3) the time when the claimant either discovered or ought to have discovered enough information with respect to his claim to have warranted his seeking a judicial remedy and (4) the time when the limitation period applicable to the claim expired and the defendant became entitled to immunity from liability under the claim.

2.2 The first relevant time is the time when the breach of duty occured. What conduct constitutes the breach of a duty is defined by the general law, and "general law", as we will use the term in this report, means the law of a jurisdiction other than its limitations law. Under the general law, a breach of duty will always consist of some conduct, that is, some acts or omissions for which the defendant is legally responsible.

2.3 The second relevant time is the time when the remedial claim, or the cause of action as it is more often described, accrued. Under the general law, a claim accrues when all of the essential facts upon which it is based, and which entitle the claimant to a judicial remedy, have occurred. Because most remedial claims accrue when the breach of duty occured, the first and second times are usually concurrent. However, if the remedial claim is based on negligent conduct, it does not accrue until the claimant suffered the harm, that is, the injury, damage or loss for which he claims a remedy, and it may not accrue until he discovered or ought to have discovered that harm. Consequently, if the occurrence of the harm is delayed, a claim based on negligent conduct will accrue at a time later than the time when that conduct occurred. Although when conduct and any resulting harm occurred are all questions of fact, whether or not certain acts or omissions constituted the breach of a duty is a question of law. If the claimant has a valid remedial claim, he will be entitled to a judicial remedy when that claim accrued as a matter of law, and this is true regardless of the extent of his knowledge of either the relevant facts or the applicable law.

2.4 The third relevant time is the time when the claimant either discovered, or ought to have discovered, enough information with respect to his claim to have justified his requesting a judicial remedy. In this report we will refer to this time as the "time of discovery". Unlike the time of accrual of a remedial claim, the time of discovery depends upon when the claimant acquired, or ought to have acquired, the requisite knowledge; it depends upon when he learned, or ought to have learned, enough of the relevant facts and the applicable law to have justified his bringing a remedial claim. And, just as when events occurred is a factual question, so what knowledge of those events and of the pertinent law the claimant actually possessed at any time is itself a factual question.

2.5 The time of discovery of a remedial claim is important in developing a statutory scheme for giving a claimant a reasonable time, and no more than that, in which to assert that claim. We must emphasize at the outset, however, that considerable caution must be exercised in using the time of discovery of a remedial claim as an element in the design of a limitations system. At this stage in our report we have used quite elastic language to describe the time of discovery. Although there is no way to formulate a generally applicable statutory definition of the precise amount of knowledge which would prompt a reasonably diligent person to bring a claim, we believe that a definition with sufficient accuracy to be both practical and fair can be developed. While we will discuss this definition subsequently, we will state our conclusion that a definition will not be functional if it establishes the time of discovery as the time when a claimant discovers everything about his remedial claim which he needs to know in order to determine whether he will be successful in litigation. At the time a claimant brings a remedial claim he will seldom be certain of everything which must subsequently be determined, for even after a claim is brought much of the energy of litigants and lawyers is typically expended in attempting to learn the facts and the law. Indeed, theoretically a claimant will not know definitely that he has a remedial claim until he acquires all of the knowledge of facts and law which the court must ultimately have in order to grant him the remedy which he seeks.

2.6 The fourth relevant time is the time when the limitation period applicable to the remedial claim expired and the defendant became entitled to immunity from liability under the claim. It simply marks the end of a period of time, usually beginning with the occurrence of the breach of duty, designed to give the claimant a reasonable opportunity both to discover that he was probably entitled to a judicial remedy and to bring a claim.

2.7 The fundamental problem which makes it difficult to design a statutory system which allows a claimant no more than a reasonable limitation period in which to assert a remedial claim stems from the fact that there is sometimes a lapse of time, or gap, between the time of accrual of a claim and the time of its discovery. In order to present this situation in perspective, we will state a series of conclusions which are based on our academic research and our practical experience. Often the time of accrual and the time of discovery are almost simultaneous; the gap is at most a few days. In the great majority of cases, the gap is less than one year. Nevertheless, in a significant minority of cases the gap between the time of accrual of a claim and the time of its discovery is not only longer than one year, but varies widely because of the infinite variation in the fact patterns of specific disputes. The existence of a relatively long and quite variable time gap in a significant minority of cases is the fundamental problem which makes it difficult to develop reasonable statutory limitation periods.

2.8 The seriousness of this problem can be more readily appreciated if we emphasize the fact that a limitations system must establish a body of rules of relatively generalized application; a limitation period must apply to all, or to a defined category of, remedial claims. However, because of the length and variation of the gap between accrual and discovery in a significant minority of cases, the facts in these cases may not conform with the typical fact patterns upon which the limitation rules are predicated. If the number of limitation rules is small, the system may be easy to understand and efficient to operate, but the danger is that the mechanical application of its broad rules to cases on the fringe of a category of remedial claims may produce injustice. Increasing the number of rules and the number of categories of claims will tailor the system, but each increase will make the system more complex and less efficient to operate because of the difficulty in determining which cases fall into which statutory categories.

2.9 The experience of three centuries has shown that it is a formidable task to design a limitations system that will deal adequately with both the significant minority of cases in which the gap between accrual and discovery is relatively long and unpredictable and the majority of cases in which that gap is relatively short and predictable. Our research and thinking have disclosed only a small number of possible strategic elements that can be used to design a limitations system which gives a claimant a reasonable time, but no more than that, in which to discover and assert a remedial claim, and which thus accomplishes the policy objectives of a limitations system discussed in Chapter 1. These strategic design elements are listed below.

(1) Commencement of limitation period at time of discovery.
(2) Measurement of limitation period by judicial discretion.
(3) Commencement of limitation period at time of conduct.
(4) Commencement of limitation period at time of accrual.

(5) Use of different limitation periods of fixed duration.

(6) Assignment of different limitation periods to different categories of claims.

(7) Suspension of limitation period for person under disability.

(8) Variation of limitation period because of agreement or admission.

2.10 The English legal system developed two radically divergent strategies for a limitations system, resulting from quite different combinations of these basic design elements; we describe the two strategies as "the strategy in equity" and "the strategy at law". We will now discuss and evaluate these two strategies, for together they form the foundation of the present Alberta Act.

B. The Strategy in Equity

2.11 The English equity courts used a limitations system known as the doctrine of laches. The equity judges developed this system and it is not of statutory origin. Although there has been a movement in common law jurisdictions since the nineteenth century to subject equitable claims to statutes of limitations, the doctrine of laches remains applicable to equitable claims which are not governed by a limitations act. The equitable limitations strategy embodied in the doctrine of laches is based on the first two design elements listed above. The operation of the limitation period commences at the time of discovery, and the duration of the limitation period is measured by judicial discretion.

(1) Commencement at time of discovery

2.12 The limitation period in equity begins when the claimant either discovered, or with the exercise of reasonable diligence should have discovered, enough information with respect to the breach of duty to have warranted his seeking an equitable remedy. In this report we will refer to this rule defining the time of commencement of the limitation period in equity as the "equitable discovery rule". As with most judicial rules, there are both advantages and disadvantages associated with the use of the equitable discovery rule.

(a) Advantages

(i) Fair

2.13 The primary advantage of the equitable discovery rule is its fairness; it prevents the denial of a remedial claim before the claimant has had a reasonable opportunity to discover that he is probably entitled to a judicial remedy, for by definition the limitation period does not even begin to run until this time. Because the limitation period begins to run at the time of discovery, rather than at the time of accrual of the claim, the equitable discovery rule simply avoids the critical problem produced by the gap between these two times.

(ii) Comprehensible

2.14 A second important advantage of the equitable discovery rule is that it is quite comprehensible. It incorporates a simple and straightforward statement of one of the objectives of a limitations system: to allow a claimant a reasonable period of time in which to discover enough information to warrant his seeking a judicial remedy. Morever, the question of when the limitation period begins to run under this rule involves a primarily factual issue, for the period commences when the claimant acquired or could have acquired the requisite knowledge of the material facts and the relevant law, and what knowledge he possessed at any point in time is itself a factual question. Because the rule clearly articulates its common-sense purpose of giving a claimant a reasonable opportunity to acquire the necessary information to support his claim, and because when he acquired this knowledge is primarily a factual question, the substantive issue in any litigation under the rule - when the limitation period began - should be easily understood by the litigants. This may be preferable to the limitations system under the strategy at law. Under this system, which we will discuss subsequently, the limitation period begins at the time of accrual of a remedial claim, and the time of accrual is a legal issue which is often both complex and technical.

(b) Disadvantages

(i) Uncertain beginning

2.15 The commencement of the limitation period in equity is somewhat uncertain because the period does not begin until the claimant discovered, or with reasonable diligence should have discovered, enough information to have warranted his seeking an equitable remedy. We have described the uncertain beginning of the limitation period under the equitable discovery rule as a disadvantage. Actually, the uncertainty with respect to the beginning of the limitation period created no problems within the context of the equitable limitations system, for under that system the duration of the limitation period is measured by judicial discretion. As an equity judge could extend the limitation period as long as he deemed just, he required no guidelines defining the amount of knowledge which would trigger the beginning of the period.

2.16 Over the course of centuries the elements which were blended into the equitable limitations system formed a reasonably efficient system. However, there has been a marked trend in recent decades to incorporate rules similar to the equitable discovery rule into limitations acts, and frequently a fixed limitation period is used, rather than a period left to judicial discretion. When this is done the uncertainty with respect to the beginning of the limitation period is a significant disadvantage. For this reason, we will discuss the three features of the equitable discovery rule which produce this uncertainty.

2.17 First, the rule does not attempt to define either the type or amount of knowledge which would prompt one to request a judicial remedy. Rather, the knowledge required to activate the operation of the limitation period is also left to judicial discretion.

2.18 Secondly, although the equitable discovery rule incorporates a constructive knowledge test when it prescribes that the limitation period begins when the claimant reasonably should have discovered the requisite knowledge, even if he did not actually do so, it does not clarify what standard is to be used under this test. There are two possibilities. The standard could be either (1) what the actual claimant, with his abilities, ought reasonably to have discovered, or (2) what a reasonable person, perhaps with more or less ability than the actual claimant, would have discovered.

2.19 Thirdly, if in a particular case the beginning of the limitation period depends on when the claimant actually discovered the requisite knowledge, it will depend on a subjective factual question. Whether or not an event occurred is a question of objective fact; it depends on facts external to and independent of the human mind, and objective facts can usually be established by direct evidence. Whether or not a claimant knew that an event occurred is a question of subjective fact; it depends on the state of his mind, and a subjective fact must usually be established by an inference based on objective facts.

2.20 We do not believe that the beginning of the limitation period under the equitable discovery rule will depend on when the claimant actually discovered the requisite knowledge in many cases, and even when it does we do not think that the uncertainty in the beginning of the period produced by the necessity for a subjective factual determination will be very significant. The equitable discovery rule incorporates a constructive knowledge test; the limitation period begins either when the claimant discovered the requisite knowledge, or when he ought to have discovered it, whichever occurs first. Assume that the claimant discovered the requisite knowledge after he ought to have discovered it, but that the defendant is entitled to a limitations defence in either event. A claimant will always have participated, to some degree, in the chain of events within which the alleged breach of duty occurred, and this participation will be provable by direct evidence of objective facts. The statement that the claimant ought to have discovered the requisite knowledge at a particular time simply reflects a judicial conclusion of law that, based on a proven degree of participation in the crucial events, the claimant ought to have discovered any additional information necessary to obtain the prerequisite knowledge by this time through reasonable investigation. In short, as long as the defendant is entitled to a limitations defence on the basis of the claimant's constructive knowledge, the court will not have to determine a subjective fact, that is, whether or not the claimant actually discovered the requisite knowledge. Indeed, when the claimant actually discovered the requisite knowledge will only be crucial if, through chance or unusual diligence, he discovered that knowledge before he could reasonably have been expected to do so, and the defendant would not be entitled to a limitations defence based on the time of the claimant's constructive knowledge. Even here we do not believe that the need for a finding of a subjective fact will add much uncertainty as to the beginning of the limitation period. When the claimant did discover the requisite knowledge will usually be readily inferable from objective evidence of what he was actually told or of his involvement in the relevant chain of events.

(ii) Unduly deferred beginning

2.21 The second disadvantage of the equitable discovery rule is that it may unduly defer the commencement of the limitation period, and hence its end, and indeed may defer both indefinitely. A reasonably diligent claimant might not discover enough information to warrant his bringing a remedial claim until several decades after the occurrence of the conduct for which the defendant is alleged to be legally responsible. Permitting him to seek a remedy after this long delayed time of discovery may be eminently fair to the claimant, but it frustrates all of the reasons which require a limitations system. For all practical purposes, no member of the society can safely say that, as a prescribed number of years have passed since his conduct which took place at a particular time, he is now immune from liability under any remedial claims, whether spurious or meritorious, based on events which took place at or before that time. Unfortunately, the only way to give defendants protection from spurious claims is to guillotine all claims at some specified time after the occurrence of events, and the equitable discovery rule precludes the achievement of this crucial objective.

(c) Examples in present Alberta Act

2.22 Although limitations acts did not initially apply to equitable claims, there has been a comparatively recent movement in common law jurisdictions to expand the coverage of these acts to include them. It is not surprising that, when equitable claims were incorporated into a limitations act, some form of the equitable discovery rule was imported with them. We have carefully said "some form of the equitable discovery rule", for frequently a variant of this rule is used in a limitations act. In this report, when precision is not required, we will refer to any form of the equitable discovery rule used in a statute as a "discovery rule".

2.23 A discovery rule is used in several sections of the present Alberta Act, and the two most straightforward examples of this are clauses 4(1)(d) and (e), which read as follows:

> 4(1) The following actions shall be commenced within and not after the times respectively hereinafter mentioned:
>
> > (d) actions grounded on fraudulent misrepresentation, within six years from the discovery of the fraud;
> >
> > (e) actions grounded on accident, mistake or other equitable ground of relief not hereinbefore specifically dealt with, within six years from the discovery of the cause of action;

We offer three comments with respect to these provisions.

2.24 First, they do not incorporate the equitable discovery rule, for that rule has a constructive knowledge feature; the limitation period begins to run when the claimant ought to have acquired the requisite knowledge with the exercise of reasonable diligence in a case in which he actually acquired that knowledge at a later time.

2.25 Secondly, these provisions do not define the knowledge which the claimant must obtain in order to discover "the fraud" under clause (d), or "the cause of action" under clause (e). Must he learn all of the relevant facts and the applicable law, or will a lesser amount of information suffice? When an equity court applies the complete strategy in equity it is of no particular significance that the time of commencement of the limitation period is uncertain, for the duration of the limitation period is left to judicial discretion. But both clause (d) and clause (e) include a fixed limitation period of six years. We believe, therefore, that the uncertainty with respect to the commencement of the limitation period under these provisions is a serious problem.

2.26 Thirdly, although clause (e) by its terms applies only to equitable relief, clause (d) is not so restricted and appears to encompass both legal and equitable claims grounded on fraudulent misrepresentation.

2.27 Sections 6 and 57 of the present Alberta Act provide that if a cause of action has been concealed by the fraud of the person asserting a limitations defence, the cause of action shall be "deemed" to have arisen when the fraud was first known or discovered. Section 31 is similar, but interestingly, it provides that the cause of action shall be "deemed" to have accrued when the fraud was "or with reasonable diligence might have been" first known or discovered, and hence comes closer to the equitable discovery rule. These three sections warrant three comments.

2.28 First, in sharp contrast with clauses 4(1)(d) and (e), sections 6, 31 and 57 do not utilize a direct statement that the limitation period begins to run from the time of discovery of the fraud. Rather, they seem to reflect a belief that some immutable principle requires that the limitation period begin with the accrual of the cause of action and that, in order to preserve this principle, a cause of action which in reality accrued at one point in time must be fictionally "deemed" to have accrued when it was subsequently discovered.

2.29 Secondly, none of these sections defines the amount of knowledge a claimant must possess before he will be considered to have first discovered that his cause of action was concealed by fraud. Hence, they leave the time of commencement of the limitation period relatively uncertain.

2.30 Thirdly, section 6 applies to all of the categories of actions described in Parts 1 and 2 of the present Alberta Act, section 31 applies to all of the categories in Part 3, and section 57 applies to all of the categories in Part 9. Collectively, the categories described in these four parts of the Act encompass a substantial majority of the judicial claims recognized under the general law of Alberta. Consequently, a discovery rule is applicable to most claims in Alberta if the claim was fraudulently concealed.

(2) Measurement by Judicial Discretion

2.31 The second basic design element in the equitable limitations system is measurement of the limitation period by judicial discretion. Beginning with the time of discovery, the system allows the claimant a period of time which appears to the court under the particular circumstances to be adequate for bringing the claim. Because the length of the limitation period, and hence the time when the defendant will be entitled to immunity from liability under the claim, is discretionary, there is no need for the time of discovery to be established accurately. A court can, through judicial discretion, give a claimant more or less time to assert a claim either by varying the amount of knowledge required to establish the starting point of the limitation period or by altering the length of the limitation period. Rather than engaging in a difficult debate about the exact time of discovery, the equity courts instead chose the easier route and focused on the factors which they considered relevant to the proper length of the limitation period.

2.32 Thus the strategy in equity simply shifts the problems created by uncertainty from the time of commencement of the limitation period to the time of its expiration. However, this uncertainty is neither as great nor as capricious as it might at first seem. Although the equity courts exercise discretion, they do not act arbitrarily; equitable discretion is exercised within a framework of guidelines. Unlike legal rules, equitable guidelines can be applied with flexibility; the courts can respond to the unique fact pattern of each case. The length of the limitation period in equity depends on striking a balance between the interests of the claimant and those of the defendant. The guidelines emphasize either the claimant's reasons for delay in bringing a claim or reasons resulting in prejudice to the defendant because of the delay.

(a) Claimant's reasons for delay

2.33 The claimant's reasons for delay may be divided into two groups: those affecting the accuracy and extent of his knowledge at the time of discovery, and those affecting his situation or condition. An example will serve to illustrate both groups. When a trust relationship exists between a claimant and a defendant, the claimant might experience considerable difficulty in uncovering the facts, particularly if the defendant conceals them. Even after the time of discovery, the claimant might reasonably delay bringing a claim until he is quite satisfied as to the accuracy and extent of his information. In addition, when the claimant is the beneficiary of a trust, his situation is significant. As a beneficiary is entitled to repose confidence in his trustee, he will generally be allowed a generous period of time in which to bring a claim.

2.34 The claimant's situation or condition will also justify his delay in bringing a claim in other circumstances. More time is generally allowed for class actions, because agreement among many individuals about the details of an action is difficult to achieve. More time is generally allowed if the defendant is a close relative, for litigation is frequently postponed in this situation because of its adverse effect on family tranquility. Moreover, time will not run against a claimant under a disability, for neither a minor nor an incapacitated person is considered capable of managing his financial affairs. In this way the equitable limitations system incorporates the seventh basic design element stated in paragraph 2.9: suspension of the limitation period for a person under disability. However, it does so as an aspect of judicial discretion, and not by means of a fixed rule.

(b) Prejudice to defendant

2.35 The guidelines concerned with reasons resulting in prejudice to the defendant because of the claimant's delay will now be considered. Perhaps the reason of overriding importance is loss of evidence; if the claimant's unexplained delay has resulted in the defendant's loss of the evidence needed to support his defence, the claim will probably be denied in equity.

2.36 Two further reasons concerned with prejudice to the defendant form the basis for equitable guidelines which incorporate, respectively, the eighth and the sixth basic design elements stated in paragraph 2.9. Again, however, it is important to recognize that in the equitable limitations system these elements are used as guides for the exercise of judicial discretion; they are not inflexible rules of law.

2.37 The eighth element is variation of the limitation period because of an agreement or an admission. If, shortly before the claimant brought a claim, the defendant admitted the existence of some liability under the claim, it is unlikely that the claim would be denied for limitations reasons, for the admission would normally be treated as an acknowledgement by the defendant that the claimant's delay had not prejudiced him.

2.38 The sixth basic design element, categorization of claims, is important in the discretionary balancing process used to determine the duration of the limitation period in equity. The reason is that the extent of the delay which will prejudice a defendant varies according to the nature of the equitable remedy requested. For example, if a claimant could elect either to affirm or to rescind a voidable contract, his claim for rescission would be denied if he delayed his election until he saw which alternative was the most advantageous to him, even if his delay were very short. On the other hand, a claimant might request the rectification of a contract on the grounds of mutual mistake. As granting this remedy would merely alter the written document to reflect the true intention of the parties, delay on the part of the claimant is not usually considered prejudicial to the defendant, and a prolonged delay will usually be tolerated in equity. However, other factors, such as the loss of evidence by the defendant, or the emergence of third party rights, could shift the balance in favour of denying the remedy.

(c) Evaluation

2.39 The advantages and disadvantages of the equitable practice of establishing the length of the limitation period by judicial discretion are similar to those associated with the use of the equitable discovery rule. Functionally, the use of judicial discretion can give a claimant a reasonable amount of time, after the time of discovery, in which to attempt to negotiate a settlement and to request an equitable remedy, and thus can achieve a primary goal of a limitations system. Because the stated goal of the equitable practice is to allow a period of time which is, on balance, fair to both the claimant and the defendant, the practice can be readily understood by the parties to any litigation. We have briefly summarized the guidelines which are used in equity to balance the respective interests of a claimant and a defendant. They all focus on quite practical factual issues. Consequently, the substantive issues in any litigation under the equitable practice can be appreciated by the parties.

2.40 The disadvantage of the use of judicial discretion is that it leaves the time of expiration of the limitation period relatively uncertain in all cases. Although the guidelines within which equity operates make it possible for lawyers to predict the approximate length of the period which will be allowed in equity for bringing a claim, nevertheless, we do consider this residual uncertainty surrounding the time of expiration of the limitation period in equity a serious disadvantage.

2.41 Whether or not the method for determining the length of the limitation period under the strategy at law is any better is another question. This strategy is discussed subsequently, and only preliminary remarks will be offered here in order to introduce a comparison. The legal limitations system uses a set of different categories of claims, and each category of claims is matched with one of several fixed limitation periods, each of a different duration. The court must first characterize a claim by type in accordance with principles of the general law. For example, the claim may be based on contract law or tort law. The court must then determine which category in the limitations act, and hence which fixed limitation period, was intended to apply to the claim. Not infrequently the general law leaves it uncertain as to how a claim should properly be characterized, and the limitations act does not clearly establish the category applicable to the claim. These characterization and categorization problems involve issues of law which are often quite technical, and which are seldom very comprehensible to the litigants. Because they create uncertainty as to which of several possible limitation periods applies to some claims, they leave the time of expiration of the limitation period applicable to these claims uncertain.

(d) Example in present Alberta Act

2.42 The present Alberta Act applies to all remedial claims, both legal and equitable, for section 2 provides:

> 2 The provisions of this Act apply to all causes of action whenever arising.

Section 2 is reinforced by clause 4(1)(g), the catch-all provision, which provides:

> 4(1) The following actions shall be commenced within and not after the time respectively hereinafter mentioned:
>
> > (g) any other action not in this Act or any other Act specifically provided for, within 6 years after the cause of action therein arose.

These provisions do not mean that every action is subject to a limitation period, for some actions are "specifically provided for" by provisions which state that they shall not "be barred by this Act". Sections 40 and 41, which apply to some equitable claims of a beneficiary against his trustee, provide an example of this.

2.43 Although all claims which are subject to a limitation period under the present Alberta Act, including equitable claims, are subject to a period of fixed duration, the principle of judicial discretion was imported into the Act, as was a discovery rule, with respect to equitable claims. It is section 3 which accomplishes this.

> 3 Nothing in this Act interferes with a rule of equity that refuses relief, on the ground of acquiescence or otherwise, to a person whose right to bring an action is not barred by virtue of the Act.

2.44 A person's right to bring an action could not be "barred by virtue of this Act" in two situations: (1) when the particular action was not subject to a limitation period under the Act at all, and (2) when the action was brought within the applicable limitation period. Section 3 only preserves a rule of equity which refuses relief. In a situation (1) case, as no limitation period would be applicable under the Act, the court would have as much discretion as a rule of equity provided to either grant or refuse relief. However, in a situation (2) case the court could only refuse relief to a claimant whose claim was not already barred by the Act. In short, section 3 preserves a court's discretion to give a claimant less time to bring a claim than the applicable limitation period, but not more time if the claim were already barred under the Act.

2.45 Section 3 refers to "a rule of equity that refuses relief, on the ground of acquiescence or otherwise . . . ." Acquiescence is an equitable doctrine akin to estoppel. Under both doctrines, a claimant will be denied relief if, through his conduct, he has led the defendant to believe that he has waived his rights against the defendant, and if the defendant has relied on this conduct to his detriment. In theory, both the acquiescence and estoppel defences available to a defendant are based on the claimant's conduct, and not merely on his delay in bringing a claim. These defences may bar a claim long before a limitation period has expired, and properly analyzed, are not part of a limitations system at all.

2.46 Section 3 preserves rules of equity that refuse relief on the grounds included in the words "or otherwise". What do these words mean? The equitable limitations system is known as the doctrine of laches, and we believe, therefore, that the words "or otherwise" were intended to preserve a court's discretion to refuse equitable relief if it concluded that a claimant's delay was unreasonably long, notwithstanding that his claim was not barred under the Act.

(3) Summary

2.47 Judicial discretion is the dominant theme of the equitable limitations system; it governs the duration and hence the time of expiration of the limitation period, and, because it determines the amount of knowledge which will serve to activate the limitation period, it also strongly affects the time of commencement of this period. The flexibility of the system carries with it one serious functional disadvantage: uncertainty. In a relatively few cases, the claimant will not obtain the knowledge required to activate the limitation period until decades after the conduct for which the defendant is responsible took place. Because of the possibility of these cases, as a practical matter, potential defendants can never be certain that they will be entitled to immunity from liability under a claim at some reasonable time after the occurrence of their conduct; the slate is never wiped clean. However, in most cases claimants will obtain the requisite knowledge soon enough to permit defendants to rely justifiably on the system to give them reasonable protection from the hazards inherent in defending themselves from stale claims. Nevertheless, even in these cases, the exact time of expiration of the limitation period will remain uncertain until the claim is brought and the court determines whether or not the defendant is entitled to immunity for limitations reasons.

2.48 The primary advantage of the equitable limitations system is that it guards against the denial of a remedial claim until the claimant has had a reasonable opportunity to determine that he is probably entitled to a judicial remedy and to request that remedy. Moreover, this system has another important advantage. It can be readily understood by the litigants, for it is based on two simple equitable rules which, collectively, articulate the functional objectives of a limitations system in sensible terms. The limitation period begins at the time of discovery and its duration is ascertained by the discretionary process of balancing the claimant's justification for delay against the prejudicial consequences to the defendant caused by the delay. The application of these equitable rules depends upon judicial determinations of questions of fact which are relevant to the litigants. Consequently, litigation under the equitable system is not technical, and it rarely produces expensive appeals. A lawyer representing a claimant can tell his client that his remedy is barred because, on the facts established by the evidence, he either discovered or should have discovered a breach of duty but did nothing to enforce his rights for an excessive length of time. Although this may be a bitter pill for the claimant, it can at least be understood as the application of a common-sense policy in the light of the proven facts. We believe that this gives the equitable limitations system a decided advantage over a system which requires the result to be explained in terms of such highly technical legal rules as those determining the time of accrual of that legal abstraction known as a cause of action, and the characterization and categorization of a remedial claim for the purpose of assigning to it one of a number of fixed limitation period. We think that those designing a limitations system should take note that it is proper to ask what, if anything, accrual, characterization and categorization rules have to do with whether or not a claim was brought in a timely fashion.

C. The Strategy at Law

2.49 The limitations system at law has always been embodied in legislation and continues to follow a strategy which was first formulated in The Limitation Act, 1623 (U.K.).[11] The strategy at law is based principally on the fourth, fifth and sixth design elements listed in paragraph 2.9: commencement of limitation period at time of accrual, use of different limitation periods of fixed duration, and assignment of different limitation periods to different categories of claims. As these elements establish the method of operation of the limitation periods under the strategy at law, they will be discussed in this chapter on limitation periods. The strategy at law also utilizes the seventh and eighth design elements: suspension of limitation period for person under disability and variation of limitation period because of agreement or admission. These design elements will be considered, respectively, in Chapters 6 and 8 of this report.

2.50 The primary objective of the strategy at law is the same as that of the strategy in equity; both strategies attempt to provide a limitations system which is fair and efficient. But, whereas the dominant theme of the equitable limitations system is judicial discretion, the limitations system at law is designed to operate as mechanically as possible under fixed rules of law. This system attempts to provide limitation periods which are not only reasonable, but which will expire at times which can be predicted by the parties with a high degree of certainty.

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[11] *Supra* n. 1.

2.51 The limitation period applicable to a claim begins when the claim accrued. Whether or not certain events took place, and the circumstances under which they took place, are questions of fact, and they are usually questions of objective fact. However, whether or not these events gave the claimant a valid remedial claim is a question of law. Hence, the beginning of the limitation period at law is normally determined by objective facts and a rule of law fixing the time of accrual of a claim. Different limitation periods of fixed duration are assigned to different types or categories of claims by the limitations act. As each claim can be characterized as to type by rules of law, the limitation period applicable to each claim can be determined by rules of law. If the claimant does not bring a claim before the expiration of the applicable limitation period, the claim is barred if the defendant asserts a limitations defence. In theory this system is simple, it should be easily understood by the public, and it should operate with almost mechanical efficiency.

2.52 Perhaps the limitations system at law functioned well in England before the industrial revolution. Since that time, however, industrial, commercial and governmental institutions have become exceedingly complex and populations have grown dramatically. With these changes the law has become larger and more intricate; additional rights have been recognized and the battery of remedies available for the infringement of rights has been enlarged. Our research has not disclosed any scholarly materials, including recent law reform reports, which have critically analyzed the overall adequacy of the strategy at law.

We have attempted to do this, for we have grave doubts that this strategy has produced a limitations system which is sufficiently fair, efficient and predictable. As the present Alberta Act is largely based on the strategy at law, we will take examples from this Act. The problems inherent in this strategy will be discussed in terms of its three primary design elements.

(1) Different limitation periods of fixed duration

2.53 The heart of any limitations system is its limitation periods. Under the strategy at law different limitation periods of fixed duration are matched to different types or categories of claims. The present Alberta Act, which is representative, utilizes four basic fixed limitation periods of one, two, six and ten years. Because the limitation period begins with the accrual of a claim, it operates in gross in the sense that it must give a claimant a reasonable period of time to discover enough information to justify a conclusion that he is probably entitled to a judicial remedy, to conduct settlement negotiations, and to request a judicial remedy when that is required. As we stated in paragraphs 2.7-8, however, the critical problem is that in a significant minority of cases there is a substantial gap between the time of accrual of a claim and the time of its discovery, and that this gap varies widely depending on the facts unique to each case. The fixed limitation period assigned to any category of claims does not allow for any variation in the time of discovery required for particular cases. A fixed limitation period which is reasonable for the majority of cases will operate harshly upon a claimant who did not, even with normal diligence, discover the necessary information within that period. However, if the fixed limitation period is lengthened in order to operate with greater fairness to claimants in atypical cases, it will give claimants in the typical cases an unnecessarily long period of time in which to bring claims, to the possible prejudice of defendants. Whether or not the use of different fixed limitation periods for different categories of claims results in reasonable limitation periods depends on how well these periods operate, on balance, in achieving fairness for claimants and the objectives of a limitations system for defendants.

(a) Fairness for claimants

(i) Usual discovery period for claim

2.54 It may be argued that there is a normal period of time which a claimant will require to discover the requisite information about a claim which will vary in length according to the type or category of claim. If this were so it would justify assigning a relatively short limitation period to those types of claims in which the usual discovery period is relatively short, and a longer limitation period to those types of claims in which the usual discovery period is longer.

2.55 Under the present Alberta Act, the limitation periods applicable to certain categories of claims are as follows:

(1) claims against a member of one of the medical professions based on negligence or malpractice, one year from the date the professional services terminated (section 55);

(2) most tort claims, two years from accrual (section 51);

(3) most contract claims, six years from accrual (clause 4(1)(c)); and

(4) recovery of a debt through foreclosure of a mortgage, ten years from accrual (section 34).

2.56 It is probable that the odds that a patient will discover an injury caused by medical malpractice during the first year after the services were performed is at most only slightly higher than the odds that he will discover the injury later. A victim who was knocked to the pavement in an intentional tortious assault might discover, in a few minutes, that his head was cut, but it is quite possible that he could not discover that the impact left permanent brain damage until more than two years from the time of the assault. A purchaser might discover that a product was sold to him in breach of a contractual warranty shortly after the sale, but it is also quite possible that the defect in the product might not be discovered until after the six-year limitation period. We are not aware of any empirical evidence which supports the theory that there are usual discovery periods for different types of claims. We do not believe that there are usual discovery periods for claims of the types just discussed, and, based on our experience, we do not believe that there are usual discovery periods for most types of claims. A creditor has six years from default in which to bring a claim against his debtor on the debtor's personal covenant, but he has ten years to bring a claim to foreclose a mortgage on the same debt. We do not believe that it will take a secured creditor four years longer than it will take an unsecured creditor to discover that a payment on a debt is overdue. Indeed, we think that a creditor, whether secured or unsecured, will discover this fact in a very short time. Although there may well be a very short usual discovery period for a claim based on a contract debt, we do not think that the limitation periods of six and ten years are based on it. We doubt very much if any of the limitation periods in the present Alberta Act are based on the theory that there are usual discovery periods for different types of claims.

(ii) Claims of greater economic importance

2.57 It may be argued that certain types of claims have more economic importance than others, and that a claimant should, in fairness, be accorded more time in which to assert such claims. It may be thought that a secured loan made by a bank is more important to it than a loan for which it obtains no security, and hence that limitation periods of ten and six years, respectively, for a claim to enforce a mortgage as opposed to a personal covenant are appropriate. We do not believe there is any valid economic reason for such a distinction. Under the present Alberta Act most tort claims are subject to a two-year limitation period and most contract claims are subject to a six-year limitation period. Hence a claim for the recovery of a stolen Mercedes-Benz must be brought within two years of the conversion of the car but a claim for damages for the breach of a contract to sell such a car can be brought until six years after the breach of contract. Claims based on defamation, and most personal injury claims, are subject to a two-year limitation period. We do not believe that, on balance, contract claims can be said to have any more economic importance than tort claims.

(b) Objectives of a limitations system

(i) Unnecessary civil proceedings

2.58 The objective of a limitations system is to encourage the timely resolution of disputes by giving claimants no more than a reasonable period of time in which to assert claims for judicial remedies. A limitation period may be unreasonable if it is too short to give a significant number of claimants an adequate discovery period. It may also be unreasonable if it is too short to provide an adequate negotiation period and hence encourages unnecessary civil proceedings. Although a limitations system should prevent a claimant from bringing a claim unduly late, it should not require him to bring one with undue haste. If a short limitation period forces claimants to bring claims which will probably be settled merely to preserve their positions, it simply saddles both parties with unnecessary legal costs.

2.59 It may be argued that certain types of claims are less likely to be disputed than others, and that longer limitation periods are justified for these claims. The example usually cited is a claim to recover a debt. If a debtor defaults on a debt, the creditor will usually learn this fact within days of the default and the accrual of the claim. Nevertheless, even if the debt is unsecured, the creditor has six years in which to bring a claim under the present Alberta Act. Usually neither the existence nor the amount of the debt is disputed. Rather, the debtor has found himself in economic difficulty and is unable to pay. Frequently it will be in the creditor's interest to give the debtor more time; often the creditor is likely to recover more money in the long run by granting the debtor time to work himself out of a financial hole than he is by forcing the debtor into bankruptcy through civil proceedings.

2.60 While we fully agree that a limitations system should not encourage unnecessary civil proceedings, we are unable to agree with the argument that the solution lies in different limitation periods for different categories of claims. Assume that a claimant discovered the necessary information about a tort claim a few days after the tortious conduct, and about a contract claim a few days after the breach of contract. We cannot accept an argument that an appropriate limitation period for purposes of settlement negotiations is one or two years for the tort claim but six years for the contract claim. Whatever limitation period is used, if the parties are in fact conducting settlement negotiations, or if a creditor wishes to allow a debtor additional time for payment, the parties will be able to use an agreement, with minimal cost, to avoid unnecessary litigation. This subject will be discussed in Chapter 8.

(ii) Deterioration of evidence

2.61 It may be argued that the evidence required to prove the facts relevant to a claim will deteriorate less rapidly with respect to some types of claims than others, and that this factor justifies the use of different limitation periods for different categories of claims. We know of no empirical evidence which supports this theory, and we do not believe that existing limitations systems give effect to it. The present Alberta Act uses a one or two-year limitation period for most tort claims and a six-year limitation period for most contract claims. Can this be based on the theory that the evidence relevant to a contract claim is more durable than that relevant to a tort claim? The proof of certain alleged conduct which would, if it had actually occurred, be tortious or create a contract may depend on "soft" oral evidence. It is equally possible that, for example, the type and amount of a drug administered to a patient in a hospital today, or the terms of a contract, will be provable by "hard" computer-stored evidence. Frequently breach of a contract must be proved with oral evidence. Often the most controversial issue in a case is the nature and amount of damage suffered by the claimant, and much of the evidence on this issue will frequently be oral whether the claim is in tort or contract. A tort claim based on negligence does not accrue before the claimant suffered damage, and this will often be some time after the defendant's conduct took place. Hence, although the tort limitation period is shorter than that applicable to a contract claim, relative to the time of the defendant's conduct, the tort limitation period may start later and expire later. This is certainly inconsistent with the theory that the evidence relevant to a tort claim is usually less durable than that relevant to a contract claim. Under the present Alberta Act the limitation period for a claim to recover an unsecured debt is six years, while the limitation period for a claim to collect a secured debt by foreclosure is ten years. In both cases the balance owing will depend on what advances and what payments were made. There is little reason to believe that evidence on these issues will be better preserved, as the difference in limitation periods suggests, if the creditor bank happens to hold a secured debt. Our conclusion is that the theory that the evidence required to prove the facts relevant to different categories of claims deteriorates at different rates is too unreliable to be used in the design of a limitations system.

(iii) Other reasons for a limitations system

2.62 There are more reasons for a limitations system than those based on deterioration of evidence. In Chapter 1 we discussed reasons based on peace and repose, economic reasons and judgmental reasons. We do not think that the use of different fixed limitation periods for different categories of claims assists in achieving the objectives of a limitations system based on any of these reasons.

(c) Summary

2.63 Our conclusion is that there is neither a sound theoretical nor practical foundation for the practice of assigning different fixed limitation periods to different categories of claims. Our conclusion that this practice is unsound is bolstered by the fact that the limitation period which has been assigned to a particular category of claims has varied not inconsiderably in different jurisdictions with socio-economic environments similar to that of Alberta. If the present practice were sound, we doubt that the diversity of treatment of a category of claims would be so prevalent. Not only do we think that the use of different limitation periods for different categories of claims serves no useful purpose; we think that the practice results in limitation periods which are too often unreasonable, either to claimants or to defendants. We are not surprised. As law, with its rights and remedies, has grown more complex, the unusual has become more usual, and claims cannot be placed into categories with any reliable relevance to their discovery periods, economic importance, or vulnerability to deteriorated evidence.

(2) Categorization of claims

2.64 Under the strategy at law different limitation periods of fixed duration are matched to different types or categories of claims. In order to determine if a particular claim brought by a claimant is of one type or another, the claim must be described or characterized. A particular claim could be characterized as a tort claim, or, as there are many different types of tort claims, the claim could be described more specifically as a claim based on defamation or trespass. However, when a limitations act provides that the limitation period for a tort claim, or a trespass claim, is two years, it is establishing a category of claims, for many claims will answer these descriptive words "tort" and "trespass".

(a) Primary methods of categorization

2.65 Claims can be characterized and hence categorized in several different ways. We have identified five primary methods of categorization commonly used in limitations acts. The categories actually used in limitations acts will usually reflect various combinations of these primary methods. We will list what we consider to be the primary methods of categorization and will give examples based on each method with the key word used in each example to define the category in italics. The five primary methods of categorization, with examples, are given below.

(1) According to the source of the remedy. This method

focuses on the judicial origin of the remedy, as *legal* or *equitable* depending on the court which historically granted the remedy, or, in the case of a remedy of statutory origin, on the specific *act* that created it.

(2) According to the conduct or transaction which justifies the remedy. This method focuses on the breach of duty which supports the remedy and the policy reasons for it. There are several basic categories: the defendant may have breached a *contract*, violated a *trust* obligation or committed a *tort*. These basic categories may be divided into increasingly specific subcategories. The culpability of the conduct may be stressed by such modifying adjectives as *fraudulent*, *negligent*, *intentional* or *innocent*. Or, the duty may be more specifically defined. A trust obligation may be based on an *express*, *implied* or *constructive* trust, and a tort may be categorized as *trespass*, *defamation*, *conversion*, *negligence*, etc.

(3) According to the type of remedy which is sought. This method of categorization is based on the ultimate goal of the remedy and the procedure for attaining it, and the two elements are so interrelated that it is difficult to effect a practical separation. The examples that follow are stated in terms of the procedure and goal of the remedy, in that order: a judgment for money to enforce a *debt*; a judgment for the return of *possession* of property to one with a superior claim to possession; a decree of *specific performance* of a contract; and a decree of *foreclosure* of a mortgage to enforce a debt.

(4) According to the status of the parties. A claim may be categorized as by or against: the *Crown*; a *trustee*; a deceased's *personal representative*; and a *corporation*.

(5) According to the tangible subject matter affected. Categories may be defined with reference to *persons* or to such things as *real* or *personal property*, *goods*, *chattels*, *land* or *money*.

2.66 The problems resulting from the necessity for categorization of claims under the strategy at law can be traced to two sources. Some are caused by the difficulty in designing a comprehensive, appropriate and unambiguous set of categories in the limitations statute itself, and others arise because descriptive terms and concepts from the general law must be used to define categories.

(b) Problems in designing categories

2.67 These different primary methods of characterization and categorization, and combinations of them, offer considerable flexibility in establishing categories of claims over a wide range of specificity, from very broad to very narrow. However, the more different categories a jurisdiction chooses to use in its limitations act, the more difficult it becomes to design an act which is comprehensive, which assigns appropriate limitation periods to different categories of claims, and which is not ambiguous. A limitation period is inappropriate if it is too short or too long, and a limitations act is ambiguous if it assigns different and hence overlapping limitation periods to a category of claims. The designer of a limitations act must be aware of every type of claim available under the judicial system in order to minimize these problems. And, when they do arise they create difficult statutory interpretation problems.

2.68 The present Alberta Act utilizes four fixed limitation periods, of one, two, four and ten years. As some claims are not subject to any limitation period, there is also, in effect, a fifth period of unlimited duration. Because of these five different periods, the Act must identify the categories of claims to which each applies. Moreover, there is an additional aspect of the Act which requires further categorization. Although the fixed limitation periods usually begin with the accrual of a claim, sometimes a limitation period begins at the time of discovery of a claim, and sometimes at the time of the defendant's conduct, which may be before a claim accrues. The Act must identify the categories of claims to which these atypical commencement rules apply.

2.69 A limitations act can guarantee comprehensiveness, and can reduce the number of categories based on characterization of claims, by using a residual "catch-all" provision. For example, clause 4(1)(g) of the present Alberta Act subjects all claims not otherwise provided for in that Act or any other Act to a six-year limitation period beginning with the accrual of the claim. This assures the comprehensiveness of the Alberta limitations system and eliminates the need to describe the claims subject to the residual provision. Nevertheless, all other claims must be described and assigned to either the no-limitation period or one of the remaining fixed limitation periods, and, even though one limitation period of, say two years, is to be assigned to a category of claims, this period may begin at different times for different subcategories of claims if different commencement rules are considered appropriate for different subcategories.

2.70 The more different categories a jurisdiction uses the more it increases the risks of inappropriate and ambiguous limitation provisions. Assume that the designer of a limitations act wishes to assign a six-year limitation period to most claims based on breach of contract, a category described according to the conduct or transaction which justifies the remedy. It is possible that he will want to assign a two-year limitation period to some contract claims, further described according to the source of the remedy, the type of the remedy sought, or the status of one of the parties. Unless the designer has a thorough knowledge of the general law and the different types of contract claims, it is possible that he will inadvertently leave a claim which is, in terms of limitations policy, analogous to claims governed by a two-year limitation period, in the broader and inappropriate category governed by the six-year limitation period. The risk of an inappropriate limitation period is especially acute when a residual provision is used, for that provision will govern all claims not otherwise provided for.

2.71 The risk of ambiguous and potentially overlapping limitation provisions is also increased with categorization because of the different primary methods available for characterizing claims. Assume, for example, that an investment broker fraudulently persuaded a client to entrust him with money by promising to invest the money for the client, and then used the money for his own purposes. Clause 4(1)(c) of the present

Alberta Act prescribes a six-year limitation period, beginning with accrual, for a claim for damages for breach of contract: characterization according to the conduct or transaction which justifies the remedy and the type of remedy sought. Clause 4(1)(d) prescribes a six-year limitation period for a claim grounded on fraudulent misrepresentation: characterization according to the type of the defendant's conduct and the degree of culpability. However, this limitation period begins on discovery of the fraud. Sections 40 and 41 provide that no limitation period applies to a claim by a beneficiary against his trustee based on fraudulent breach of an express trust: characterization according to the type of the defendant's conduct, the degree of culpability of the conduct, and the status of the parties. On the facts, there was a contract induced by a fraudulent misrepresentation which created a trust. Which of the above limitation provisions governs the client's claim? We would be hard pressed to answer this question, but we can ask another to further confound the issue. Clause 4(1)(g) establishes the residual provision in the Act, which is a six-year limitation period beginning with the accrual of a claim. Could the claim be based on the tort of deceit, which is not otherwise provided for in the Alberta limitations system, and thus subject to the residual provision? These overlapping categories leave the present Alberta Act ambiguous.

(c) Problems inherent in the general law

2.72 The cause of inappropriate or ambiguous limitation provisions can also be traced to a characteristic of the general law. The designer of a limitations act must describe and hence define the categories of claims required by using words with technical legal meanings drawn from the general law, such as "contract", "tort", "fraud", "negligence", "damages", and "trustee". However, the general law is continually evolving, the meaning of these words changes with this evolution, and this alters the scope of the categories in a limitations statute. In both theory and normal practice, changes in the general law occur for reasons of public policy unrelated to limitations law and its policy. When the meaning of a general law descriptive word changes in this normal evolutionary process, the meaning of a limitation provision which uses this word may also change for reasons which are capricious insofar as limitations policy is concerned. As a result, the limitation provision may become inappropriate or ambiguous. Moreover, it is quite possible that courts have occasionally altered the conventional characterization of a claim in order to match the claim to a limitation provision considered more appropriate by the court. Whether or not a change in the general law made to secure a result which a court deemed more just in terms of limitations policy did produce a more just result requires a value judgment. However, if a court has done this it has substituted its judgment as to the appropriateness of a limitation provision for the judgment of a legislature. For example, a claim against a lawyer alleging negligent performance of contracted professional duties was formerly characterized as a contract claim.[12] Now it seems that, depending on the circumstances, a court can characterize such a claim as either in tort, because of the negligence allegation, or in contract.[13] Under the present Alberta Act the limitation period for a contract claim is six years, the period for a tort claim for economic loss based on negligence is also six years, and both periods begin with the accrual of the claim. However, as a tort claim based on negligence does not accrue until the claimant has suffered damage, and perhaps even later if the court imposes a discovery rule, the six-year limitation period for such a claim will frequently expire later than the six-year period for a contract claim. When a court can characterize a claim in different ways it can frequently use the characterization process to select the limitation provision which it considers fair for a particular claim.

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[12] *Schwebel v. Telekes* [1967] 1 O.R. 541 (C.A.), 61 D.L.R. (2d) 470.

2.73 The designer of a limitations system has no feasible way to prevent a limitation provision from becoming inappropriate or ambiguous because of a change in the meaning of a general law descriptive term. He can create a category of claims described as "contract claims" with the reasonable belief that this category will include a particular type of claim because the courts conventionally described claims of this type as contract claims. But he cannot prevent the courts from describing claims in new ways. Characterization will change as the general law evolves for reasons unrelated to limitations law, and sometimes the courts will redescribe certain types of claims to avoid the application of a limitation provision which they perceive as harsh.

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[13] *Consumers Glass Co. Ltd. v. Foundation Co. of Canada. Ltd.* (1985) 20 D.L.R. (4th) 126.

(d) Summary

2.74 We can summarize the problems created by the need to characterize and hence categorize claims under the strategy at law. The limitations system based on that strategy is intended to operate relatively mechanically through the application of simple and clear rules of law. Unfortunately, the need for characterization seriously impedes the realization of this objective, for the characterization process requires judicial judgments, and the applicable rules are frequently complex and uncertain.

2.75 The more categories of claims a limitations act uses the more likely it is that the statute will contain inappropriate and ambiguous limitation provisions even if the general law terms used to describe claims were stable. A court will be faced with a difficult task of statutory interpretation when it is required to characterize a claim based, in part, on the legal concepts of contract, tortious negligence and trust in order to determine which one of three possible limitation provisions applies to the claim when each provision is matched to a category of claims described primarily in terms of only one of these concepts. Cases of this kind will require difficult judgments often involving complex and technical characterization rules. Moreover, the law will be based on specific cases. As these cases will arise sporadically over time in different jurisdictions, and will often reach different conclusions, the law will usually be in a state of flux and relatively uncertain.

2.76 Changes in the meaning of general law terms used to describe categories of claims in a limitations act will simply increase the foregoing difficulties. Many of the provisions in a limitations act will have been appropriate and unambiguous when the statute was enacted. But, when the meaning of some descriptive terms changes with the development of the general law, the categories defined by these terms will often become inappropriate or ambiguous.

2.77 Whether or not a claim will be barred under the limitations system at law will frequently depend on which of a group of possible limitation provisions applies to the claim. As that issue will turn on the proper characteriization of the claim, the litigation will involve complex and technical rules of law rather than factual issues related to limitations policy which can be understood by the litigants.

(3) Commencement at time of accrual

2.78 Under the strategy at law the limitation period applicable to a claim begins when the claim accrued. One of the principal objectives of the limitations system at law is to provide limitation periods which expire at times which can be predicted by the parties with a high degree of certainty. Fixed limitation periods are used in order to achieve this objective. However, if this objective is to be achieved, it is also crucial that the time of commencement of an applicable limitation period, and hence the time when a claim accrued, be ascertainable with accuracy.

2.79 When claims accrue is determined by rules of general law, and these accrual rules, like the characterization rules previously discussed, are usually of judicial origin.

Consequently, when a limitations act provides that the limitation period applicable to a claim begins when the claim accrued, the statute usually incorporates the relevant judicial accrual rule. The basic judicial rule is that a claim accrues when all of the essential facts upon which the claim is based, and which entitle the claimant to a judicial remedy, have occurred.[14] This, of course, tells us very little, for the vital issue is, "what are the essential facts with respect to any particular type of claim?". When a claim accrued depends on when these essential facts occurred, and the question of when certain events occurred presents questions of fact itself. Indeed, *that* something happened may be an easier factual issue to resolve than *when* it happened. Nevertheless, we are not concerned with these factual issues here. Rather, when we speak of "accrual rules", we refer to the rules of law which define the essential facts which support a type of claim; we are concerned with what the essential facts are, for that must be determined before we can determine when they occurred.

2.80 Unfortunately, the accrual rules are extremely complex, they are frequently uncertain, and they often result in a limitation period beginning at a time which is inappropriate insofar as the reasons for and the objectives of a limitations system are concerned. Moreover, the problems of uncertainty and inappropriateness are sometimes related. If an accrual rule produces an unsuitable result in the limitations context, one can predict that the rule will be adjusted at some time in the future, either by judicial or legislative efforts, and this results in uncertainty.

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[14] *Reeves v. Butcher* [1891] 2 Q.B. 509.

2.81 The accrual rules often produce inappropriate results in terms of limitations policy because, in theory and usual practice, they are not based on that policy. A judicial system must have rules which determine what events must have transpired in order to entitle a claimant to a judicial remedy, and these rules would be required even if a jurisdiction had no limitations system. When an accrual rule formulated in terms of general law policies is used to establish the commencement time for a limitation period, the period may begin either too soon or too late to satisfy the objectives of limitations policy.

2.82 The accrual rules are frequently uncertain because they change with the development of the general law. When that law evolves through judicial decisions, the process depends on specific cases. Cases arise randomly, in different jurisdictions, at different times, and with varying facts. Assume that the Court of Appeal of Alberta confirmed an accrual rule in a decision in 1975, and that highly respected appeal courts in two other Canadian jurisdictions subsequently adopted a different accrual rule for a similar type of claim. An Alberta lawyer would have difficulty predicting how the Alberta courts would decide a similar case in the future. They might follow the "old" rule as a matter of policy or because the cases which adopted the "new" rule were distinguishable on their facts. Or, they might adopt the "new" rule. Assume that the Court of Appeal of Alberta confimed an accrual rule in a decision last week. The Supreme Court of Canada could override that decision next week. Any accrual rule in a transitional stage will be relatively unpredictable.

2.83 The general law is also developed through the legislative process. Frequently a statute will create a new right-duty relationship. However, not infrequently the legislation will not clearly define the conduct which will constitute a breach of the new duty created; it will not clearly define the essential facts which will support a claim based on the new law. In this situation the courts may be required to fashion an appropriate accrual rule, there may be inconsistent decisions in the early stages of the process, and the rule may be unstable for some period of time.

2.84 In paragraph 2.81 we said that accrual rules are usually based on general law considerations independent of limitations policy. Our statement was qualified because, as some examples we will discuss below demonstrate, "hard" limitations cases have occasionally induced courts to alter accrual rules for reasons based on limitations policy. However, whether an accrual rule undergoes adjustments because of limitations policy or general law policy, during the transitional period the rule will be uncertain. Indeed, when an accrual rule is altered for limitations reasons, the uncertainty may be more difficult to resolve and hence more prolonged for there will probably be more conflicting decisions as the courts struggle to fashion a rule which is consistent with the goals of both the general law and limitations law.

2.85 We believe that the following facts evidence the seriousness of the problems associated with accrual rules. In the Fourth Edition of *Halsbury's Laws of England*, 90 pages are largely devoted to accrual problems.[15] In the present Alberta Act the following sections and subsections are concerned with accrual problems: 6, 7, 14(3), 19-32, 35, 36(2), 37(2), 39(2), 41(3), 42, 45, 53-55, and 57.

2.86 We will now discuss some examples which demonstrate the problems which are caused by uncertain and unsuitable accrual rules. A debt normally reflects a contractual arrangement between a debtor and his creditor. The present rule for a claim based on a debt due on demand is that a demand for payment is not an essential element of the claim, and that the claim therefore accrues when the loan is made. Consequently, under clause 4(1)(c) of the present Alberta Act the six-year limitation period begins when the loan is made, and any claim of the creditor would be barred six years later even though no demand for payment had ever been made. However, if the contract expressly makes the debtor's liability to pay contingent on demand, as is the case with a promissory note which requires presentment, and is usually the case with a depositor's account with a bank (which makes the bank a debtor and the depositor a creditor), a demand for payment is an essential element of the claim, and the claim does not accrue until a demand is made. Hence the six-year limitation period would not begin until there was a default after a demand for payment. We do not believe there is any reason why the limitation period should begin at different times in these two similar situations. Rather, the technical accrual rules produce a result which is inappropriate in one situation or the other.

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[15] 28 *Halsbury's Laws of England* (4th ed. 1979) 295-385.

2.87 The central theme of our remaining examples is harm, whether it be described as personal injury, property damage, economic loss, nominal damage or otherwise. A breach of duty will always require some conduct, some act or omission of the defendant. We know that, as a matter of reality, a claimant may not have suffered any actual harm at the time of the defendant's conduct; the actual harm may have been sustained later. As well, even after actual harm is recognized, its magnitude may depend on future events. With respect to harm, there is no functional reason consistent with limitations policy to distinguish between claims based on contract, tort, statute or duties of care based on any of the three. However, the accrual rules do recognize these distinctions, and because the applicable limitation period for a claim under the limitations system at law begins with the accrual of the claim, so does that system.

2.88 Usually, but not always, the breach of duty will occur, the claim will accrue, and the claimant will become entitled to a judicial remedy, at the time of the defendant's conduct. Assume, for example, that D contracted to construct a building for C in accordance with detailed specifications, that D installed roof support girders which were significantly inferior to those required by the specifications, and that the roof collapsed eight years after the building was constructed. D assumed no contractual duty to construct the building with care, and even if he had, he would not have breached such a duty for he installed the inferior girders with great care. Actual damage is not an essential element of a claim based on breach of contract. Consequently, D breached his contract with C when he delivered the building with the below-specification girders, C's claim accrued at that time, the six-year contractual limitation period under clause 4(1)(c) of the present Alberta Act began at that time, and D became entitled to a limitations defence two years before C suffered any actual damage. We do not believe that this harsh result is required by limitations policy. However, if the roof had collapsed 24 years after D's alleged breach of contract, our conclusion would be otherwise, for the following reason. This example assumed the critical issue: that the girders did not comply with the contractual specifications. We have grave doubts that permitting the litigation of this issue 24 years after the events took place would be consistent with limitations policy.

2.89 Assume, for example, that D intentionally assaulted C, that C suffered minor cuts, bruises and a brain concussion at this time, and that C did not discover the brain damage until four years after the assault. Actual damage is not an essential element of a claim based on an intentional tort, for the law reflects a value judgment that the victim is entitled to a compensatory judicial remedy because of the defendant's conduct. Hence D breached his duty not to assault C at the time of the assault, C's claim accrued at that time, the two-year tort limitation period under clause 51(b) of the present Alberta Act began at that time, and D became entitled to a limitations defence two years before C discovered his serious injury. We do not believe that limitations policy requires this harsh result. The physiological response of the human body to tortious conduct, and hence both the existence and the extent of serious harm, will often not become apparent until some time after the conduct. We do not quarrel with the accrual rule in this example; in terms of general law policy, C's claim for a judicial remedy to vindicate his right not to be assaulted should accrue at the time of the assault. However, C may well opt to refrain from investing his money in pursuit of a remedy for this purpose alone, and we see no reason why the law should press him to do so. In short, we do not believe that limitations policy requires the commencement of a short limitation period at the time of accrual in this example. Rather, we think that a claimant should be allowed more time to determine the seriousness of his injury.

2.90 Assume, for example, that D (an employer) carelessly (negligently) caused C (his employee) to be exposed to carcinogenic radiation over a period of eight years, that it could be established that C developed cancer because of the radiation four years after the exposure stopped, and that C did not discover his illness, and could not reasonably have done so, until three years after he had suffered it. Tort law draws a sharp distinction between intentional as opposed to careless (negligent) conduct. Tort law does not impose any duty on a person to behave carefully, but it does impose a duty on him not to harm another person by careless conduct. Therefore, careless conduct does not become tortious conduct unless it harms someone, and hence actual harm is an essential element of a claim based on the breach of a duty of care. Consequently, the orthodox rule is that a claim based on the breach of a duty of care accrues when, and not until, the victim suffers harm caused by the negligent conduct. This means, of course, that the claim may not accrue until years after the defendant's negligent conduct. This rule was applied by the House of Lords in 1963 in the leading case of

Cartledge v. E. Jopling & Sons Ltd.[16] Under the orthodox rule C's claim accrued when he developed cancer, the two-year tort limitation period under clause 51(b) of the present Alberta Act began then, and D became entitled to a limitations defence one year before C could reasonably have discovered his illness.

2.91 It was generally thought that a new accrual rule - that a claim based on the breach of a duty of care does not accrue until the claimant discovers his harm, or ought with reasonable diligence to have discovered it - was adopted in England in 1976 in *Sparham-Souter v. Town & Country Development (Essex) Ltd.*[17] This new rule was quickly accepted by some Canadian appellate courts.[18] However, in 1982, in *Pirelli General Cable Works Ltd. v. Faber*,[19] the House of Lords firmly overruled *Sparham-Souter* and reaffirmed the orthodox rule of the *Cartledge* case. In *Pirelli* the defendant was a firm of consulting engineers that had designed a chimney for the claimant's factory, and the claimant advanced two claims, one based on breach of contract and the other based on the breach of a duty of care in designing the chimney. The limitation period had clearly run on the contract claim, for that claim accrued when the defendant submitted the inadequate design. The limitation period had also run on the negligence claim, for the court held that it accrued when the cracks appeared in the chimney, but this claim would have been timely had the court held that it had not accrued until the claimant could reasonably have discovered the damage.

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[16] [1963] A.C. 758, [1963] 2 W.L.R. 210, [1963] 1 All E.R. 341 (H.L.).

[17] [1976] 2 W.L.R. 493, [1976] 2 All E.R. 65 (C.A.).

[18] *E.g. Robert Simpson Co. v. Foundation Co. of Canada* (1982) 36 O.R. (2d) 97 (C.A.), 134 D.L.R. (3d) 459; *John Maryon International Ltd. v. New Brunswick Telephone Co. Ltd.* (1983) 141 D.L.R. (3d) 193; 43 N.B.R.(2d) 469, 113 A.P.R. 469 (C.A.).

[19] [1983] 1 All E.R. 65 (H.L.).

2.92 The issue under consideration came before the Alberta Court of Appeal in 1984 in *Ruzicka v. Costigan.*[20] In that case C and a buyer orally contracted that C would transfer a parcel of land to the buyer in return for $1600 cash and an agreement giving C a right to graze cattle for C's lifetime on all of the parcel except that occupied by a saw mill to be constructed by the buyer. D (a lawyer) agreed to handle the transaction for both parties. D procured the transfer from C to the buyer and registered it on July 10, 1962. But, he "forgot" to obtain a written lifetime grazing agreement from the buyer for C, and thus never filed a caveat to protect C's claimed rights. Rather, D billed C for what he had done and closed his file on the transaction. In 1972 the buyer sold and transferred the parcel to another party who, upon registration of the transfer, took title clear of any rights C had in the land. In 1974 the new owner ordered C to keep his animals off the land, and C then learned that no lifetime grazing agreement had ever been either secured for him or protected by caveat. C brought a civil proceeding against D in 1977, and, as in the *Pirelli* case, made two claims, one based on breach of contract and the other based on negligence: on D's breach of a duty to represent C with professional care. The parties agreed that, whether the action was in contract or tort, the applicable limitation period was six years from accrual under either clause 4(1)(c) or clause 4(1)(g) of the present Alberta Act. Presumably clause 4(1)(c) would apply if the claim were described as in contract and clause 4(1)(g), the catch-all provision, would apply if the claim were described as in tort for negligence. The court carefully emphasized that it was not required to decide whether or not the action was in contract or tort, or was comprised of two separate claims, as the limitation period of six years had expired in any event. However, it analyzed the case on the basis of two alternative claims.

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[20] [1984] 6 W.W.R. 1, 33 Alta. L.R. (2d) 21, 13 D.L.R. (4th) 368, 54 A.R. 385, leave to appeal to S.C.C. refused [1984] 6 W.W.R. 1 xiii, 33 Alta. L.R. (2d) xxxvi, 58 A.R. 1.

2.93 With respect to the contract claim, C urged the court to follow the reasoning of *Midland Bank Trust Co. v. Hett, Stubbs & Kemp*,[21] and to hold that D had a continuing contractual duty to obtain and caveat a written lifetime grazing agreement from the buyer for C, and that this contractual duty was not finally breached until 1972 when it could no longer be performed because of the sale of the land to another person. The court noted that this theory could apply in many contractual situations, with the result that the breach of contract would not occur, the contractual claim would not accrue, and the limitation period would not begin to run, until a potentially indefinite time in the future. This result would, of course, subvert the policy of limitations legislation. The court rejected this theory and held that D breached his contract with C not later than the date that D closed his file in 1962. Consequently, the six-year limitation period for the contract claim expired some time in 1968, long before C learned of the breach of the contract in 1974.

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[21] [1978] 3 All E.R. 571 (Q.B.).

2.94 With respect to the tort claim based on breach of the duty to perform professional legal services with care, the court chose to follow *Pirelli* as a matter of policy. As we stated in paragraph 2.90, under the general law harm is an essential element of a tort claim based on the breach of a duty of care. Once the claimant has suffered harm, we do not think that any court would hold that his entitlement to a judicial remedy, and his claim, had *not* accrued at that time, unless such a holding would block the operation of a limitation provision which the court considered unjust in the circumstances. The court acknowledged the difficulty inherent in applying a limitation provision which bars a claim before the claimant was aware of his entitlement to a remedy. Nevertheless, the court held that C suffered damage on July 10, 1962, when the transfer from C to his buyer was registered, for by not first securing a written lifetime grazing agreement for C, D left C with only an oral agreement vulnerable under the Statute of Frauds. Consequently, the six-year limitation period for the negligence claim also expired in 1968, long before C learned of D's breach of duty in 1974.

2.95 The court noted the present trend of the law recognizing concurrent remedies in contract and tort, and emphasized that as harm may not flow from negligent conduct until generations after that conduct, the limitation period may not give the defendant adequate protection from a stale claim, and that if the limitation period does not begin until the claimant has discovered his damage, the claim may be even more delayed. The court said that although it could engraft a discovery-based accrual rule, such as the *Sparham-Souter* rule, on legislation to solve the problem of a specific case, it could not add a balancing provision required by limitations policy to protect a defendant irrespective of the claimant's lack of knowledge. The present Alberta Act contains no such ultimate limitation provision, and the courts cannot properly create one. The court concluded that a fairly balanced limitations system must be accomplished through legislation of general import. We completely agree with this conclusion of the Alberta Court of Appeal, and with the reasons which support it.

2.96 The last case we will discuss on this subject is *Kamloops v. Nielson*,[22] decided by the Supreme Court of Canada in 1984. Although the judgment in this case was delivered nine days before the judgment in *Ruzicka*, it was not available to the Alberta Court of Appeal. D (the city of Kamloops) sought to insure that buildings, such as C's house, were properly constructed by supervising construction under the authority of a by-law. A majority of the court held that, through this by-law, D imposed a duty upon itself, for the benefit of others, to perform this supervision with reasonable care in order to prevent, insofar as possible, harm to persons flowing from faulty construction. A contractor built a house for a first buyer with a defective foundation, and both the first buyer and D's building inspectors were fully aware of the problem. The first buyer was one of D's aldermen, he urged D not to enforce the by-law with respect to his house, and D did not do so. The construction took place largely in 1974 and the first buyer purchased the house on April 9, 1975. In December 1977 the first buyer sold the house to C. Although C hired a contractor to make a general inspection of the house, the contractor did not crawl under the house to inspect the foundation. In November 1978 a plumber hired by C to fix a pipe discovered that the foundation had subsided and informed C of the fact. Thus the damage had occurred by November 1978 and C discovered the damage at that time. C brought his claim against D in January 1979 and alleged that D had breached its duty of care by failing to enforce the by-law. A majority of the court held that D had, indeed, breached its duty of care owed to C.

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[22] [1984] 2 S.C.R. 2, [1984] 5 W.W.R. 1, 10 D.L.R. (4th) 64.

2.97 Our concern is the limitations defence which D would have acquired had either of two potential limitation provisions been held applicable. First, however, we will note that the court was not faced with an issue as to how C's claim should be characterized. The court was not required to decide whether the claim "sounded" in contract or in tort, or whether one set of facts supported two independent claims, one in contract and one in tort. There was one claim based on the breach of a duty of care created by a by-law issued under statutory authority.

2.98 One limitation provision was subsection 738(2) of the Municipal Act which imposed a one-year limitation period beginning with the accrual of the claim. This limitation provision was repealed as of July 1, 1975 by the Limitations Act, 1975 (B.C.).[23] That Act is now the Limitation Act which we refer to as the "B.C. Act". Had C's claim accrued prior to July 1, 1974, the one-year limitation period under subsection 738(2) of the Municipal Act would have expired before that Act was repealed, and D would have had a limitations defence under that

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[23] S.B.C. 1975, c. 37, s. 16.

Act. C's claim would have accrued before July 1, 1974 if, as the court in *Pirelli* held, a claim based on the breach of a duty of care arises when the damage occurred, and if the damage had occurred before that date. However, until the *Pirelli* decision, which was not available until after the Supreme Court first heard the *Kamloops* appeal, D had accepted the proposition that the law of Canada was as stated in *Sparham-Souter*. Hence the issue at the trial was whether or not C ought to have discovered the damage in December 1977 when he purchased the house. The trial court made no finding of fact as to when the foundation subsided and the damage actually occurred. At a rehearing of the appeal D relied on the *Pirelli* decision and submitted that the foundation had begun to subside in the Spring of 1974. Had the Supreme Court chosen to adopt *Pirelli*, it would have faced a serious problem, for it had a record before it which contained neither evidence nor a holding on the crucial factual issue of when the damage occurred. It avoided this problem by rejecting *Pirelli* and adopting *Sparham-Souter*. It held that, applying *Sparham-Souter*, C's claim could not have arisen until C discovered the damage in November 1978, and that holding contains an implicit finding that C could not reasonably have discovered the damage sooner. Of course by that time subsection 738(2) of the Municipal Act had been repealed.

2.99 The other potentially applicable limitation provision was subsection 3(1) of the B.C. Act, which imposes a two-year limitation period, beginning at accrual, for a claim for damages in respect of injury to property based on statutory duty. However, under subsections 6(3) and (4) the limitation period for a claim for damage to property is postponed until the claimant acquired or might have acquired certain knowledge. Thus, although the B.C. Act prescribes that the limitation period for a claim such as C's begins at accrual under subsection 3(1), in fact it does not begin until the claimant acquires or might have acquired certain knowledge, and that knowledge is elaborately defined in subsections 6(3) and (4). A legislative provision could postpone the beginning of a limitation period after accrual until the claimant ought to have discovered an amount of information about his claim on a scale ranging from a relatively minimal to an extensive amount of knowledge. The B.C. Act postpones the commencement time until the claimant ought to have been able to acquire relatively complete information. At least the claimant must have known the identity of the defendant, and ought to have known that a breach of duty by the defendant caused his damage. As the court held, in connection with the Municipal Act, that C could not reasonably have even discovered the damage until he did so in November 1978, under the B.C. Act the two-year limitation period provided by subsection 3(1) could not have begun under subsections 6(3) and (4) until that time. And, C brought his claim in January 1979, no more than three months later.

2.100 The *Kamloops* case reinforces our concerns over the problems associated with the general law accrual rules. We will now examine some specific concerns drawn from that case.

2.101 When the British Columbia Municipal Act provided that the limitation period began with the accrual of a claim, it simply incorporated whatever general law accrual rule might apply to that claim. Although the *Kamloops* case arose in British

Columbia, when the Supreme Court of Canada held that a claim based on the breach of a duty of care arises when the claimant discovered, or ought to have discovered, his claim, it *began* to evolve a general law accrual rule applicable in Canada in the absence of legislation to the contrary. To what extent can one now predict when such a claim will arise under this general law rule? This question raises two issues. (1) Perhaps we can say that the *Sparham-Souter* rule is now the law in Canada, and that *Ruzicka* has been overruled. As a matter of caution we note how often the English courts flip-flopped on this issue over a period of decades, and that at many stages one might have said, erroneously in hindsight, that the rule had stablized. Whether or not the *Sparham-Souter* rule is appropriate has certainly sparked deep judicial controversy. The *Kamloops* case was decided by five judges of the Supreme Court. Two of them dissented from the majority decision that D even had a private law duty of care to C, and the majority decision adopting the *Sparham-Souter* rule reflected the views of only three judges. (2) Assuming that the *Sparham-Souter* rule is the law in Canada, how predictable will the results be under this rule? When the commencement time of a fixed limitation period is determined under a discovery rule, it is essential that the rule define what knowledge the claimant must possess or ought to have acquired. As we stated when considering subsections 6(3) and (4) of the B.C. Act in paragraph 2.99, there is a wide range of possibilities. Under the B.C. Act the claimant must have had the means of knowing the existence of a duty owed to him by the defendant before the limitation period will begin to run. Hence the Supreme Court could well have held that, as C had no reasonably certain way of knowing that D even owed him a duty until they decided that issue by a three-two split, the limitation period applicable to C's claim began on the date of their judgment! The crucial point is that the *Sparham-Souter* "rule" is merely the embryonic beginning of a functionally predictable general law accrual rule. The *Kamloops* case only decides that the claimant must at least have been able to discover the damage. It will probably take decades of cases to determine what additional knowledge a claimant ought to have had to mark the discovery point for his claim, and hence the time of its accrual.

2.102 In both *Pirelli* and *Ruzicka* the courts stated that, if it were held that a claim based on the breach of a duty of care arose when the claim was discovered or discoverable, the limitation period might not even begin until decades after the defendant's allegedly negligent conduct, and that this would subvert the policies supporting a limitations system. Section 8 of the B.C. Act imposes an ultimate limitation period of 30 years beginning with the accrual of a claim. The Supreme Court said that this provision resolved the problem of stale claims which was the major criticism of the *Sparham-Souter* principles. It seems evident to us that the scheme of the B.C. Act is based on the presumption that a claim will accrue at one time, and that it will be discovered (as defined in section 6) either simultaneously or at a later time. Nevertheless, section 8 merely provides that the ultimate limitation period begins when a claim accrues, and thus relies on the general law accrual rules. There are no specific provisions in the B.C. Act which would override an accrual rule which would otherwise produce a result inconsistent with the limitations policy objective of section 8.

Assume that D's alleged negligent conduct occurred in 1985, that damage was suffered by C in 1990, that C's claim therefore arose in 1990 under an orthodox accrual rule, and that C discovered his claim (as defined in section 6) in the year 2030. Under section 8, the 30-year ultimate limitation period would expire in 2020, 30 years after the claim arose and 35 years after D's purportedly negligent conduct. Assume that, under the general law discovery-based accrual rule adopted in *Kamloops*, C's claim was discovered in 2030. This is a loaded assumption, for the general law discovery-based accrual rule might produce a different discovery date than the statutory discovery rule provided by section 6. C's claim would arise in 2030 under the *Kamloops* decision, the 30-year ultimate limitation period would begin then, and it would expire in 2060, 75 years after D's purportedly negligent conduct. We cannot believe that the accrual rule adopted in *Kamloops* produces a result consistent with the limitations policy objective of section 8.

2.103 When a limitation period begins with the accrual of a claim, the accrual rule will frequently present a crucial legal issue in a case. That was certainly so in all of the cases we have discussed, from *Cartledge* through *Kamloops*. Whether or not the claim was subject to a limitations defence depended on when the claim arose. The problem is that, insofar as limitations policy is concerned, there is no relationship between when a claim arose and when it should be subject to a limitations defence. The lawyer for the losing party is left to explain the loss to his client as the result of a technical rule of law which is probably baffling to his client. There can seldom be acceptance without understanding. If a client's loss could be explained in terms of the facts and sound limitations policy, the client would probably remain displeased, but his hostility to law and lawyers might be mitigated.

(4) Summary

2.104 Our conclusion is that a limitations system based on the strategy at law is not satisfactory, for three principal reasons. (1) The strategy results in limitation periods which are too often unreasonable, either to claimants or defendants, and all three of the essential elements on which this strategy is based - commencement of limitation period at time of accrual, use of different limitation periods of fixed duration, and assignment of different limitation periods to different categories of claims - contribute to this result. (2) The strategy produces a limitations system which does not offer sufficiently predictable limitation periods, and which does not, therefore, operate efficiently. The heavy reliance on judicial accrual rules and the need for characterization and categorization of claims are responsible for this complexity and uncertainty. (3) The outcome of litigation under a limitations system produced by this strategy often depends on the application of complex and technical rules of law rather than factual issues related to limitations policy which can be understood by the litigants. Again, accrual rules, characterization rules, and the need to categorize claims produce a highly legalistic limitations system.

2.105 However, our conclusion that a limitations system based on the strategy at law is unsatisfactory does not necessarily mean that it is unacceptable. It will only be unacceptable if a better limitations system can be developed. We think this can be accomplished by a new blend of the strategic design elements available into a limitations system which relies more extensively on a discovery rule. In paragraph 1.4 we referred to the current movement in the common law world seeking to reform limitations law. Perhaps the dominant feature of this movement, in terms of law reform recommendations and new legislation, has been the increased emphasis given to discovery rules. We will now discuss the increased reliance on discovery rules in recent legislation enacted in many common law jurisdictions.

D. Discovery Rules in Recent Reform Reports and Legislation

2.106 The goal of the judicial system is to provide remedies for claimants whose rights have been violated, and the subsidiary limitations system seeks to give defendants as much protection as is reasonably possible without unduly jeopardizing the achievement of the broader goal of the judicial system. A judicial system which bars a claim before the claimant could reasonably have discovered it may be said to have sacrificed a primary goal in order to achieve a secondary one. For this reason, there is merit in resolving the balance more in favor of claimants, and in using a discovery rule to trigger the running of the limitation period applicable to more claims. Recent Commonwealth reports and legislation have demonstrated a consistent trend in this direction.

2.107 The modern statutes which we will now discuss are all designed in terms of a basic initial commitment to the strategy at law. They all utilize a set of fixed limitation periods, beginning when the claim arose, with different limitation periods matched to different categories of claims. However, because they all incorporate a discovery rule to some extent, and because some of them utilize judicial discretion, each of these statutes represents an amalgamation of the two historic strategies. When we look at these statutes collectively, we can see the basic strategic design elements we stated in paragraph 2.9 being recombined into a distinctly new limitations strategy. Synthesizing the strategy at law with the strategy in equity has created new problems, and we will now discuss eight of these problems in sufficient detail to support the strategy upon which our general recommendations for reform are based. These problems are listed below.

(1) The relationship between the accrual rule and the discovery rule.

(2) The amount of knowledge constituting discovery.

(3) Whose knowledge controls discovery.

(4) The claims subject to the discovery rule.

(5) The duration of the limitation period after discovery.

(6) The extent of judicial discretion authorized.

(7) The burden of proof under the discovery rule.

(8) The need for an ultimate limitation period.

(1) Relationship between accrual rule and discovery rule

2.108 The Limitation Act 1963 (hereafter the "1963 English

Act") is generally regarded as the forerunner of the recent statutes expanding the use of a discovery rule. The basic statute in the English limitations system was the Limitation Act 1939 (hereafter the "1939 English Act"). Subsection 2(1) of this Act imposed a three-year limitation period, beginning at the time of accrual, on various types of claims to recover damages for personal injuries. This provision reflects the strategy at law; for the defined categories of claims there was a fixed limitation period which began to run when the claim accrued. Section 1 of the 1963 English Act gave a court *discretion* to *extend* the three-year limitation period applicable to a claim for damages for personal injuries to give the claimant a *maximum* of 12 months from the discovery of his claim in which to commence an action. But, as subsection 2(1) of the 1939 English Act was neither repealed nor amended, its original three-year time limit remained in effect, and two limitation periods were thus created for this type of claim, one automatic and the other discretionary. For example, if a claimant discovered a claim 18 months after it accrued, he would still have an automatic 18 months remaining in which to bring the claim and no extension could be granted. If a claimant discovered a claim 30 months after it accrued, he could bring it, as a matter of right, until the three-year limitation period expired six months later, and the court could extend the limitation period by an additional six months and thus permit the claimant to bring the claim within 12 months from the time he discovered it. If a claimant discovered a claim later than 36 months after it accrued, the court could extend the limitation period to the extent necessary to give him up to 12 months from the time of discovery in order to bring the claim. Under this limitations system, subsection 2(1) of the 1939 English Act retained significance, for the three-year limitation period beginning with the accrual of a claim could give a claimant more than 12 months from the time he discovered the claim in which to bring it. However, the discovery rule incorporated into the system by section 1 of the 1963 English Act was of paramount importance. Because the courts virtually always exercised their discretion in favor of the claimant by extending the limitation period, the claimant was almost certain to have a 12-month limitation period from the time of discovery.

2.109 Although section 1 of the 1963 English Act was repealed by the Limitation Act 1975 (hereafter the "1975 English Act"), we have summarized the earlier Act because of its historic significance, and because three jurisdictions subsequently adopted the same method of incorporating a discovery rule into their limitations systems. New South Wales did so when it enacted the Limitation Act, 1969 (hereafter the "N.S.W. Act"). Two jurisdictions amended their existing Acts: Manitoba in 1969 and South Australia in 1975.[24] In all three systems the applicable limitation period begins to run when the claim accrued, and hence the accrual rule retains a minimal importance for it may give a claimant more time to bring his claim than he would have under the discovery rule. The superimposed discovery rule is crucial, for it extends the limitation period to the extent required to give a claimant up to 12 months after discovery in which to bring his claim.

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[24] See Table of Abbreviated References.

2.110 We have referred to the 1939 English Act (which was the basic statute in the English limitations system), to the 1963 English Act and to the 1975 English Act. The latter two Acts, and the Limitation Amendment Act 1980 (hereafter the 1980 English Amendment Act) all contained amendments to the 1939 English Act. In late 1980 the 1939 English Act and the 1975 English Act were completely repealed, and the 1963 English Act and the 1980 English Amendment Act were largely repealed, by the Limitation Act 1980 (hereafter the 1980 English Act), which is now the basic English limitations statute.

2.111 The B.C. Act, the 1980 English Act, and the Prescription and Limitation (Scotland) Act 1973, (hereafter the "1973 Scottish Act"), all use a very different method of incorporating a discovery rule than did the 1963 English Act.

2.112 Section 3 of the B.C. Act honors the strategy at law to the letter. This Act utilizes three fixed-year limitation periods. Moreover, because some actions are not subject to any limitation period, there is, in effect, a fourth period of infinite duration. Section 3 is internally organized into subsections corresponding to the four limitation periods; it categorizes all actions covered by the Act, it matches them with one of the limitation periods, and it provides that a limitation period begins to run when the action arose. Subsection 6(3) then provides that for certain designated actions "[t]he running of time with respect to the limitation periods fixed by this Act for an action . . . is postponed and time does not commence to run against a plaintiff until. . . ." (in substance) he has acquired specified knowledge. The operative words of subsection 6(3) are those which provide that the limitation period "does not commence to run against a plaintiff until", but because section 3 already said that the limitation period for any action began to run at the time it arose, some language had to be inserted in section 6 to undo what section 3 had done. Hence section 6 states that the running of time "is postponed". This means that, for the actions to which section 6 applies, the accrual rule found in section 3 is totally redundant. If a claimant discovers his claim after the time of accrual, section 6 controls the commencement of the limitation period. If a claimant discovers his claim at the time of accrual, time begins to run then under both sections 3 and 6!

2.113 Section 11 of the 1980 English Act applies to claims to recover damages for personal injuries. Subsection 11(4) establishes the limitation period applicable to these claims, and the time of commencement of the period, as follows:

> (4) Except where subsection (5) below applies, the period applicable is three years from--
>
> (a) the date on which the cause of action accrued; or
>
> (b) the date of knowledge (if later) of the person injured.

Subsection 11(5) contains detailed provisions applicable when the injured person dies before the expiration of the limitation period, and does not concern us here. With respect to clauses 11(4)(a) and (b), our comments are similar to those we made in the prior paragraph when discussing the B.C. Act. The limitation period will not begin at the date of accrual under clause 11(4)(a) unless the claimant acquired the requisite knowledge by that time. Consequently, clause 11(4)(b) will always be the operative provision. If the "(if later)" insert were removed from clause 11(4)(b), that clause would state the rule simply and effectively.

2.114 With respect to the categories of actions to which they apply, subsection 11(3) and section 18 of the 1973 Scottish Act refer to the sections which provide that the limitation period begins to run when the loss, injury or damage occurred, and in effect substitute "was discovered" (actually or constructively) for "occurred".

2.115 In many cases a claimant will discover his claim when the events upon which it is based occurred and when it therefore accrued. Under the B.C. Act and the 1980 English Act, for all claims within the designated categories, the limitation period will begin to run at the time of accrual of a claim if, but only if, the claimant discovered it then. The discovery rule is not added as an alternative to the accrual rule, as was the case under the 1963 English Act; rather, it completely abrogates the accrual rule for all actions within the designated categories. In our view the drafting strategy used in these two statutes is unnecessarily complex and confusing. If a discovery rule is ultimately to control the beginning of a limitation period, we do not think that the statute should initially apply an accrual rule and then subsequently substitute a discovery rule; the discovery rule should be used in the first place.

(2) Amount of knowledge constituting discovery

2.116 In paragraphs 2.15 and 2.31 we emphasized that because the length of the limitation period in equity was discretionary, there was no need for the equity courts to define, with any precision, the amount of knowledge a claimant had to possess under the equitable discovery rule in order to trigger the running of the limitation period. However, in the modern statutes we discussed in paragraphs 2.108-115, the claimant is given either an automatic fixed period of time, or a discretionary period of time with a maximum length, after the discovery of his claim in which to bring it, and no discretion is given to the courts to extend this limitation period. Most of these statutes attempt to define the amount of knowledge which constitutes discovery with considerable accuracy.

2.117 As we said in paragraph 2.5, theoretically a claimant will not have conclusively discovered his claim until he possesses all of the knowledge that a final appellate court must have in order to grant him the remedy which he seeks. However, the question as to when a claimant discovered his claim in this theoretical sense is not the practical issue. Rather, we wish to define the amount of knowledge which would prompt a reasonably diligent person to give serious consideration to bringing an action, and this will involve considerably less knowledge than discovery in a theoretical sense.

2.118 We will now list what we consider to be the types of knowledge which could be used in formulating a functional discovery rule, and we will refer to these types of knowledge by the number used in the list.

(1) Knowledge of the harm sustained.

(2) Knowledge that the harm was attributable in some degree

to conduct of another.

(3) Knowledge of the identity of the person (the defendant) referred to in (2) above.

(4) Knowledge that the harm (considered alone) was sufficiently serious to have justified bringing an action.

(5) Knowledge that an action against the defendant would, as a matter of law, have a reasonable prospect of success.

2.119 Under subsection 11(3) of the 1973 Scottish Act, for the claims to which it applies, the discovery limitation period begins when the claimant first becomes aware of the harm sustained. This provision uses type (1) knowledge. This will probably be the first knowledge the claimant will acquire, and is, we believe, the minimum amount of knowledge which could fairly be used to trigger the operation of a discovery period. It is far less than knowledge of all of the material facts, and will result in relatively early commencement of the discovery period. If a relatively long discovery period is used, the result may be acceptable, but the claimant will still be at risk if he has difficulty in acquiring the remaining knowledge essential for bringing an action. The advantage of this approach is that it will probably make the commencement time of the discovery period more certain than any alternative.

2.120 Subsection 13(2) of the 1982 Uniform Act defines the amount of knowledge required to begin the discovery limitation period as "(a) the identity of the defendant; and (b) the facts upon which his [the plaintiff's] action is founded". We believe that this definition incorporates knowledge of types (1) through

(3). With reference to type (4) knowledge, although a claim will be founded on the harm sustained, we doubt that a claim can be said to be founded on the claimant's perception that the harm was sufficiently serious to have justified a claim. With reference to type (5) knowledge, although a claim will be founded on rules of law which exist as a matter of fact, we doubt that the words "the facts" are intended to include rules of law. Although the Uniform Act definition focuses on "the facts", it does not contain any qualifying adjective such as "material". It would appear that the discovery period will not begin until the claimant discovers the last fact *relevant* to his action and upon which it could thus be "founded". We believe that, in operation, this definition will give the courts tremendous discretion in determining when the discovery period began for a particular claim.

2.121 Subsection 48(3) of the Limitation of Actions Act, 1936-1975 (South Australia), (hereafter the "S.A. Act"), is similar to subsection 13(2) of the 1982 Uniform Act. It contains a very simple definition of the knowledge required: "facts material to the plaintiff's case". It is at least possible that this definition could encompass knowledge of types (1) through (5). As to type (4) knowledge, the seriousness of the harm could be a fact material to the plaintiff's case for the damages will depend on it. As to type (5) knowledge, if rules of law exist as facts, they would certainly be material to a case. Here to, it appears that the discovery period will not begin until the plaintiff discovers the last material fact, and when applying this definition the courts should have as much discretion in determining the commencement time of the discovery period as they would have under the 1982 Uniform Act.

2.122 Section 11 of the 1980 English Act applies a discovery rule to claims to recover damages for personal injuries, and section 14 of this Act defines the amount of knowledge required to trigger the beginning of the discovery limitation period. Although the provisions of section 14 are relatively complex, in substance they require knowledge of types (1) through (4), and type (5) knowledge is expressly stated to be irrelevant. In 1984 the Law Reform Committee issued its *Twenty-Fourth Report (Latent Damage)*, (hereafter the "Law Reform Committee 24th Report"). Because under its terms of reference the Committee could consider only the limitations law relevant to negligence cases involving latent defects (other than latent disease or injury to the person), the Committee recommendations apply only to claims for damages for property damage and economic loss, involving latent defects and based on negligent conduct. The Committee recommended that a discovery rule be applied to these claims, and that a provision adapted from section 14 (which applies to personal injury claims) be drafted to define the amount of knowledge required under the discovery rule.

2.123 Subsection 57(1) of the N.S.W. Act and subsections 18(3) and 22(1) through (4) of the 1973 Scottish Act contain very similar and very complex definitions of the knowledge requirement. Any summarization may not be completely accurate, and the one we attempt must be taken with this caution. The material facts relating to the cause of action are defined, in substance, to include knowledge of types (1) through (5). Thus knowledge of the law is included in material facts. The discovery period begins when the claimant was, or ought to have been, aware of all of the material facts "of a decisive character", and these are the material facts which would have led to a determination that an action would have a reasonable prospect of success and of resulting in an award of damages sufficient to have justified bringing the action.

2.124 Subsections 6(3) and (4) of the B.C. Act strike us as a simplified version of the provisions of the N.S.W. Act, with no change in substance intended. The subsections refer only to "those facts", and such qualifying words as "material" and "of a decisive character" are not used. However "facts" include "the existence of a duty owed to the plaintiff by the defendant" and "that a breach of duty caused injury . . . to the plaintiff", and hence include rules of law. As under the N.S.W. Act, the discovery period begins when the plaintiff discovers "those facts" showing that an action would "have a reasonable prospect of success" and the claimant ought "in his own interests and taking his circumstances into account, be able to bring an action".

2.125 With respect to the amount of knowledge constituting discovery, we prefer the solution contained in section 14 of the 1980 English Act. That solution focuses on the knowledge described in types (1) through (4), and this knowledge concerns basic facts centered on the harm sustained by the claimant. Only the type (4) knowledge raises a significant value judgment: whether the harm was sufficiently serious to have justified an action. Because of this issue the courts will have some latitude in determining when the discovery limitation period begins for a particular claim. We think, however, that all of the other solutions, except that contained in subsection 11(3) of the 1973 Scottish Act, are too vague to impose any meaningful constraints on the courts. We take particular objection to deferring the commencement of the discovery period until the claimant acquires sufficient legal knowledge to know that a claim would have a reasonable prospect of success. Frequently this will be a very difficult and subjective issue for even the lawyers and judges involved in a case, and requiring a court to determine when a claimant, usually a nonlawyer, had sufficient knowledge of the legal consequences of factual events will further confound the matter.

(3) Whose knowledge controls discovery

2.126 This subject heading encompasses two more specific problems. (1) Most modern discovery rules incorporate a constructive knowledge test: the limitation period begins when the claimant ought to have discovered the requisite knowledge, even if he did not actually do so. But does this test mean what the actual claimant, with his abilities, ought to have discovered, or what a fictional reasonable claimant, perhaps with more or less ability, ought to have discovered? (2) Whose knowledge controls discovery when the claimant is a successor owner of the claim, when the claimant is a personal representative, or when the claimant has an agent?

(a) Knowledge under the contructive knowledge test

2.127 The discovery rule used in the S.A. Act does not incorporate a constructive knowledge test at all. Rather, the discovery limitation period does not begin until the claimant actually obtained the requisite knowledge. The discovery provisions in the other modern statutes we have discussed do contain a constructive knowledge test. The issue we will now discuss with respect to these statutes is whether the claimant will be treated as having discovered (1) what he, in his position and with his abilities, could reasonably be expected to have discovered, or (2) what a reasonable person in the claimant's position would have discovered.

2.128 The provisions in the N.S.W. Act are very complex, and seem to operate at two levels. At level one, under subsection 58(2), if "any of the material facts of a decisive character relating to the cause of action was not within the means of knowledge of the applicant until" the time specified, the court is authorized to extend the applicable limitation period. Under clause 57(1)(e) "a fact is not within the means of knowledge of a person at a particular time if . . . in so far as the fact is capable of being ascertained by him, he has, before that time, taken all reasonable steps to ascertain the fact. . . ." At this level, in order to avoid being charged with knowledge of a fact which he did not ascertain, must a person (the applicant/claimant) have taken all of the steps which *he*, with his abilities, could reasonably have been expected to take, or must he have taken the steps a reasonable man would have taken? We are uncertain how a court would answer this question.

2.129 Assume, however, that the claimant is charged with knowledge of unascertained facts because they were within his means of knowledge. This may not deprive the claimant of an extension of the limitation period, for there is a further level two requirement: the facts must have been material facts of a decisive character. Under clause 57(1)(c), they will be if, but only if, "a reasonable man, knowing those facts and having taken the appropriate advice on those facts, would regard those facts as showing" that an action would have a reasonable prospect of success and of resulting in an award of damages sufficient to justify bringing it, and that it ought to be brought. Under this clause it is clear that the claimant will be charged with drawing, from "those facts", the inferences as to further judgmental facts which a reasonable man would draw, and we think that the claimant will be charged with knowledge of facts, both basic and judgmental, which would be gained by a reasonable man by seeking and taking "appropriate advice".

2.130 Subsection 6(3) of the B.C. Act is as follows:

> (3) The running of time with respect to the limitation periods fixed by this Act for an action . . .
> is postponed and time does not commence to run against a plaintiff until the identity of the defendant is known to him and those facts within his means of knowledge are such that a reasonable man, knowing those facts and having taken the appropriate advice a reasonable man would seek on those facts, would regard those facts as showing that
>
> (i) an action on the cause of action would, apart from the effect of the expiration of a limitation period, have a reasonable prospect of success;
>
> and
>
> (j) the person whose means of knowledge is in question ought, in his own interests and taking his circumstances into account, to be able to bring an action.

Under this provision the identity of the defendant must be actually known to the claimant; no constructive knowledge test appears to apply to this fact. The phrase "facts within his means of knowledge" is used, and we imply from this that the claimant will be charged with constructive knowledge of these facts even if he does not have actual knowledge of them. However, no definition of this phrase is provided, either along the lines of clause 57(1)(e) of the N.S.W. Act or otherwise. Hence we do not know whether "his means of knowledge" means the actual claimant's means or those of a reasonable person in his position. Assuming that facts are within the claimant's means of knowledge, it is clear that he must take the appropriate advice a reasonable man would seek and must draw the inferences of the specified judgmental facts which a reasonable man would draw. Subsection 6(3) of the B.C. Act is virtually identical to subsection 5(3) of the Limitations Act recommended by the Law Reform Commission of British Columbia, *Report on Limitations; Part 2 General*, in 1974, (hereafter the B.C. Report). Moreover, the B.C. Report states:[25]

> In our opinion the appropriate criteria to apply in determining when relief would be available [insofar as the state of knowledge of the potential plaintiff is concerned] should be the behaviour of the hypothetical reasonable man.

2.131 Although they are not immune from doubt, the remaining statutes we will discuss seem to adopt the view that the proper focus under a constructive knowledge test is what the actual claimant could reasonably have discovered.

Subsection 13(2) of the 1982 Uniform Act provides:

> 13(2) The beginning of the limitation period for an action is postponed until the plaintiff knows or, in all circumstances of the case, he ought to know
>
> (a) the identity of the defendant; and

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[25] B.C. Report at 74.

(b) the facts upon which his action is founded.

Subsection 14(3) of the 1980 English Act provides:

> (3) For the purposes of this section a person's knowledge includes knowledge which he might reasonably have been expected to acquire-
>
> (a) from facts observable or ascertainable by him; or
>
> (b) from facts ascertainable by him with the help of medical or other appropriate expert advice which it is reasonable for him to seek;
>
> but a person shall not be fixed under this subsection with knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice.

Subsection 22(4) of the 1973 Scottish Act provides:

> (4) Subject to the next following subsection [which relates to a person under disability], for the purposes of this Part of this Act a fact shall, at any time, be taken to have been outside the knowledge (actual or constructive) of a person if, but only if,-
>
> (a) he did not then know that fact; and
>
> (b) in so far as that fact was capable of being ascertained by him, he had taken all such action (if any) as it was reasonable for him to have taken before that time for the purpose of ascertaining it; and
>
> (c) in so far as there existed, and were known to him, circumstances from which, with appropriate advice, that fact might have been ascertained or inferred, he had taken all such action (if any) as it was reasonable for him to have taken before that time for the purpose of obtaining appropriate advice with respect to those circumstances.

2.132 We believe that a constructive knowledge test should be included in a discovery rule. A discovery rule will usually benefit claimants, and to the extent that it does so it will usually be at the expense of defendants. We do not think that it is fair to a defendant to begin a discovery limitation period when the claimant actually discovered the requisite knowledge if he could reasonably have discovered it sooner. However, because a discovery rule exists primarily for the benefit of claimants, we believe that the constructive knowledge test should be based on what the actual claimant in a case, in his circumstances and with his abilities, ought reasonably to have discovered.

(b) Knowledge of successor owners and principals

2.133 The question of whose knowledge controls the commencement time of a discovery limitation period when the claimant is a successor owner of the claim, when the claimant is a personal representative, or when the claimant has an agent, raises technical legal problems, but no serious policy issues. We will, therefore, present our recommendations on this subject in paragraphs 2.186-193 along with our specific recommendations regarding limitation periods.

(4) Claims subject to discovery rule

2.134 Determining what claims are to be subject to a discovery rule is of primary importance in the design of a new limitations system synthesizing the historic legal and equitable strategies.

2.135 Reforming provisions enacted since 1963, now found in the Manitoba Limitation of Actions Act (hereafter the "Manitoba Act"), the N.S.W. Act, and the 1980 English Act, extended the coverage of a discovery rule only to claims to recover damages for personal injuries. The Law Reform Committee 24th Report contains a recommendation that the 1980 English Act be amended so as to apply a discovery rule to claims to recover damages for property damage and economic loss, involving latent defects and based on negligent conduct. Because the Committee's terms of reference included only these types of claims, the Committee could not consider other types of claims.

2.136 The B.C. Act applies a discovery rule to significantly more categories of claims. Subsections 6(1) and (3) describe the categories as follows:

> 6.(1) The running of time with respect to the limitation period fixed by this Act for an action
>
> (a) based on fraud or fraudulent breach of trust to which a trustee was a party or privy, or
>
> (b) to recover from a trustee trust property, or the proceeds thereof, in the possession of the trustee, or previously received by the trustee and converted to his own use,
>
> is postponed and does not commence to run against a beneficiary until. . . .
>
> (3) The running of time with respect to the limitation periods fixed by this Act for an action
>
> (a) for personal injury, or
>
> (b) for damage to property, or
>
> (c) for professional negligence, or
>
> (d) based on fraud or deceit, or
>
> (e) in which material facts relating to the cause of action have been wilfully concealed, or
>
> (f) for relief from the consequences of a mistake, or
>
> (g) brought under the *Families' Compensation Act*, or
>
> (h) brought under section 150 of the *Government Liquor Act*, or
>
> (i) for breach of trust not within subsection (1)
>
> is postponed and time does not commence to run against a plaintiff until. . . .

2.137 Section 18 of the 1973 Scottish Act applies only to personal injury actions. But subsection 11(3) has a sweeping coverage. Its operation is described in the Law Reform Committee, *Twenty-First Report (Final Report on Limitation of Actions)*, (hereafter the "Law Reform Committee 21st Report"), as follows:

> 2.28 Section 11(3) caters specifically for cases of latent damage, again outside the field of personal injury. It implements a recommendation of the Scottish Law Commission by providing that, in the case of an obligation (whether contractual, delictual or statutory) to make "reparation" for loss, injury or damage where the creditor "was not aware and could not with reasonable diligence have been aware" that the loss, injury or damage had occurred, the five-year period is to start running, not on the date the cause of action accrued, but on the date when the creditor first became, or could with reasonable diligence have become, so aware.
>
> 2.29 Translated into English terms, this means that the prescriptive period starts to run against a plaintiff who has a claim for damages for breach of contract, or for tort, or for breach of statutory duty, only when he first knew, or could reasonably have discovered, that he had sustained the loss or damage in question. The Commission's report makes it clear that they did not propose to make anything turn on the plaintiff's knowledge either of the attributability of his loss or damage to the defendant's wrongful act, or of his right in law to be compensated; the Commission's intention was simply that time should start to run when the plaintiff first knew, or could reasonably have discovered, that he had in fact suffered the loss or damage in question.

2.138 By increasing the categories of claims which are subject to a discovery rule, both the B.C. Act and the 1973 Scottish Act reduce the categories which remain subject to the accrual rules. Hence they reduce both technical accrual rule problems and the risk that a claim will be barred before the claimant had a reasonable discovery opportunity. However, these Acts do not eliminate the legal problems associated with characterization and categorization. The court must still characterize each claim in accordance with judicially derived rules which are complex and often inconsistent, and it must still determine in which category the claim falls under the limitations act, and this frequently requires statutory interpretation. Indeed, because of the advantages the claimant will gain if he can induce the court to characterize his claim as one falling in a category subject to the discovery rule, characterization and categorization litigation may increase. The accrual rules will still bedevil claims which are not subject to the discovery rule, but they will be eliminated for claims which are.

2.139 We now come to the S.A. Act, as amended by the Limitation of Actions Act Amendment Act, 1975. Even as amended, the S.A. Act has the conventional structure and appearance of an act complying with the strategy at law. Most of its provisions are devoted to matching fixed limitation periods, which run from the accrual of a claim, to categories of claims. The Amendment Act of 1975 added a revised section 48 to the S.A. Act which must be described as extraordinary. It authorizes the court to extend the limitation period otherwise prescribed for *any* action to 12 months after the plaintiff discovered facts material to his case. We describe section 48 as extraordinary both because of what it does and because of the way in which it does it.

2.140 Section 48 of the S.A. Act follows the method of incorporating a discovery rule used by the 1963 English Act. If, when the claimant discovers all of the facts material to his case, he still has at least 12 months remaining of the basic limitation period computed from the time of accrual of his claim, this limitation period will determine the time available for bringing his claim. Hence the limitation period based on accrual retains a minimal significance. But, under the superimposed discovery rule, the claimant can be almost certain that he will have 12 months after he discovered some fact material to his case in which to bring a claim. In short, as a matter of practical reality, the discovery rule virtually eliminates *all* of the mystifying accrual rules in the South Australian limitations system. Moreover, as *all* actions are subject to the discovery rule under section 48, the new South Australian system also eliminates the morass of complex legal problems associated with characterization and categorization: how a claim is characterized, and what statutory category it falls into, have become virtually irrelevant.

2.141 The revolutionary Torrens system of land registration was pioneered and first enacted in South Australia. Now South Australia has gone further than any other jurisdiction in shifting the basic orientation of its limitations system to the strategy in equity. This change is not radical, for the equitable strategy is as deeply rooted in legal history as is the strategy at law. The Law Reform Committee of South Australia recommended the amendments to the S.A. Act in its Twelfth Report, *Law Relating to Limitation of Time for Bringing Actions*, (1970), (hereafter the "S.A. Report"). It is intriguing that the Committee recommended that this profound change be accomplished so subtly. The entire structure of the strategy at law remains in place in the S.A. Act, but because of section 48, it is little more than a facade.

(5) Duration of limitation period after discovery

2.142 Under the strategy in equity, no fixed limitation period was imposed after the discovery of a claim. The claimant was given a period of time to bring a claim which the court, after balancing the respective interests of the claimant and the defendant, deemed to be reasonable. Under the strategy at law there is a fixed limitation period, but because it begins to run when a claim accrues, different periods are matched with different categories of claims in order to provide a gross period for each category long enough for the claimant to both discover his claim and to assert it. When some categories of claims are to be subjected to a discovery rule, several problems are presented. Should there be a fixed limitation period at all, or should the period be left to judicial discretion? If judicial discretion is rejected, should different fixed periods be provided for different categories of claims? How long should the period(s) be?

2.143 Under the Manitoba Act (subsection 15(1)), the N.S.W. Act (subsection 58(2)) and the S.A. Act (clause 48(3)(b)), the court is authorized to extend the limitation period otherwise applicable to the extent necessary to give the claimant 12 months from the discovery of his claim in which to bring it. We agree that a claimant who acts promptly should be able to bring a claim within 12 months after discovery. However, we do not believe that a 12-month limitation period beginning with discovery will give the parties an adequate period of time in which to attempt to settle their differences without litigation. A limitation period threatening such an immediate bar could encourage the hasty commencement of litigation which, with more time available, might be compromised. Limitation systems are designed to encourage the early litigation of controversies which must, unfortunately, be litigated; they are not designed to encourage litigation.

2.144 Section 11 of the 1980 English Act establishes a three-year limitation period for personal injury claims, beginning with the date of accrual of a claim, or the date of its discovery if that is later. The Law Reform Committee, in its 24th Report, has now recommended that a discovery rule be available for claims for damages for property damage and economic loss, when the claim involves a latent defect and is based on negligence. Under section 2 of the 1980 English Act the normal limitation period for a tort claim is six years beginning with the date of accrual of the claim, and the Committee recommended that this six-year period remain applicable to the special claims considered in the 24th Report. However, the Committee recommended that the six-year period should be extended for these claims when necessary to give the claimant a limitation period of three years from the date of discovery. Thus, under the 1980 English Act, the discovery limitation period will continue to be three years for claims subject to a discovery rule if the proposed amendments are made. We believe that a three-year discovery period is reasonable.

2.145 Under the 1973 Scottish Act, section 17 imposes a three-year limitation period on personal injury claims, beginning when the injuries were sustained. Section 18, however, in effect substitutes a test of when material facts of a decisive character were discovered for a test of when the injuries were sustained. Similarly, although section 6 and subsection 11(1) impose a five-year limitation period on an array of tort and contract claims, other than personal injury claims, beginning when the loss, injury or damage occurred, subsection 11(3), in effect, substitutes "was discovered" for "occurred". Section 6 of the B.C. Act was quoted in paragraph 2.136. For the actions described in section 6, the limitation period otherwise prescribed in section 3 (which may be 2, 6 or 10 years beginning with accrual) is postponed and does not begin to run until the claim was discovered.

2.146 For the claims governed by a discovery rule, both of the Acts discussed in the previous paragraph use *the same* fixed limitation period which would otherwise have been used if the limitation period began to run when the claims accrued, under the B.C. Act, or when the injury occurred, under the 1973 Scottish Act. We question this solution for two reasons.

2.147 First, the length of a fixed limitation period under the strategy at law was designed to give a claimant sufficient time to discover, to attempt to settle, and to assert his claim. But time begins to run with discovery for many claims under these two Acts. We feel that a limitation period running from discovery should usually be shorter than one running from accrual for, although enough time must be given to attempt to settle the dispute and, if necessary, to bring the claim, no time need be allowed for discovery.

2.148 Secondly, as we discussed in paragraphs 2.54-56, categories of claims were probably assigned longer or shorter limitation periods under the strategy at law because it was thought that the usual time required for discovery varied with the type of claim. Some types of claims would tend to be discovered quickly after the events on which they were based occurred, while the discovery of others was assumed to be a more protracted process. When time begins to run with discovery under these two Acts we can see no justification for limitation periods of differing lengths.

2.149 Thus, in our opinion the two Acts just discussed will often give a claimant an unreasonably long time after discovery to bring a claim, and this is unfair to defendants. Under the B.C. Act, for example, limitation periods of 2, 6 and 10 years are shifted to commence at discovery rather than at accrual. We can agree that a limitation period of 2 or 6 years beginning at accrual might not give a significant number of claimants adequate time to discover their claims and to assert them. This justifies governing such claims by a discovery rule. However, it does not justify granting a limitation period of 6 or 10 years beginning with discovery. It seems to us that only one limitation period is required for all claims subject to a discovery rule, and that this period can be relatively short and still be fair to claimants. Moreover, we believe that the length of this period should depend primarily on the amount of knowledge selected to define discovery, for this will determine when the limitation period will begin. If more knowledge is required for discovery, a shorter limitation period after discovery will be appropriate. For example, under the S.A. Act the court is authorized to extend a limitation period, for *any* claim, for 12 months after the claimant discovers facts material to his case. Whenever additional material facts are uncovered, the 12 month period can be renewed. Under this system, 12 months should be quite adequate.

(6) Extent of judicial discretion authorized

2.150 Should the courts be authorized to bar a claim *before* a limitation period beginning with discovery has expired? Subsection 15(1) of the Manitoba Act, subsection 58(2) of the N.S.W. Act, and subsection 48(1) of the S.A. Act all authorize a court to extend the limitation period otherwise applicable to the extent necessary to give a claimant up to 12 months after discovery in which to bring a claim. Under these Acts the courts have discretion to refuse to grant a limitation period beginning with discovery at all, for a court can refuse to grant any extension, and it can grant an extension of less than 12 months.

2.151 Under the 1980 English Act, the 1973 Scottish Act, and the B.C. Act, the fixed limitation period for claims subject to a discovery rule begins to run at the time of discovery and the courts are not given discretion to shorten this period. We agree with this approach. It is, however, subject to an exception we will now discuss.

2.152 Whenever a fixed limitation period is applicable to an equitable claim, whether the period begins at accrual or discovery, the question of whether or not a court should be authorized to shorten the period arises. Section 3 of the present Alberta Act, which we discussed in paragraphs 2.43-46, authorizes a court to refuse equitable relief, on the grounds of acquiescence or otherwise, to a person whose claim has not been barred by an applicable fixed limitation period. Subsection 36(2) of the 1980 English Act, and section 2 of the B.C. Act, are similar to the Alberta provision. In our view such a provision is essential. Under accepted equitable doctrine all equitable remedies are discretionary; an equity court may exercise its discretion to deny relief to a claimant on the basis of any one or more of a number of relevant principles. The principle based on limitations policy is usually called the doctrine of *laches* (delay), but is sometimes called the doctrine of acquiescence. As we stated in paragraph 2.38, a court will frequently insist that an equitable remedy be sought quite promptly, well before the expiration of even a relatively short fixed limitation period. For example, it could be quite unjust to a defendant if a claimant were permitted to unduly delay a claim for specific performance or recision of a contract.

2.153 Should the courts be authorized to *extend* a fixed limitation period beginning with discovery and give a claimant additional time in which to bring a claim? Section 11 of the 1980 English Act, which applies to personal injury claims, establishes a three-year limitation period beginning with discovery. However, section 33 of this Act authorizes a court to override section 11 and to permit an action to proceed if it appears to the court that this would be equitable in the circumstances. The Law Reform Committee considered the subject of judicial discretion in its 24th Report, in connection with claims for damages for property damage and economic loss, when the claim involves a latent defect and is based on negligence. The Committee rejected the idea of judicial discretion with considerable vigour. They concluded that applying a discovery rule with a limitation period of three years to these types of claims would accord ample justice to claimants, and that any judicial discretion would introduce unacceptable uncertainty and would thus be unfair to defendants.

2.154 We will not recommend a provision granting the courts discretion to extend a fixed limitation period beginning with discovery. The B.C. Act does not confer such a discretion. If a discovery period is applicable, a claimant will not be exposed to the risk that his claim will be barred before he could have discovered it with the exercise of reasonable diligence. For claims subject to the discovery rule, we will recommend a limitation period of sufficient duration to give even a relatively unsophisticated claimant ample time in which to attempt to settle his controversy with the defendant and to bring a claim when necessary. We are not prepared to go further, for we believe that to do so would sacrifice the objectives of a limitations system.

2.155 Under section 48 of the S.A. Act, the court is authorized to extend a limitation period beginning at accrual to such an extent and upon such terms as the justice of the case may require if the claimant's failure to institute an action resulted from his reasonable reliance on representations or conduct of the defendant. Under these circumstances, the court is authorized to give a claimant more than 12 months after the discovery of his claim in which to assert it. Although we agree with the objective of this provision, we believe that the representations or conduct of the defendant which would justify its use would probably also constitute either an agreement not to rely on a limitations defence or an acknowledgement. Consequently, we will discuss this problem in Chapter 8 of this report.

(7) Burden of proof under the discovery rule

2.156 The existing law requires that a defendant (1) plead his entitlement to a limitations defence, and (2) prove the facts necessary to sustain that defence. Rule 109 of the Alberta Rules of Court prescribes the pleading rule, for it specifically requires a defendant to raise any statute of limitations defence. The burden of proof rule is of judicial origin.

2.157 We believe that the existing rule as to burden of proof is appropriate for a limitation period which begins with the accrual of a claim. A claim will normally accrue when the defendant's conduct breached a duty owed to the claimant, and if the time of occurrence of the defendant's conduct is in issue the defendant will, on balance, be in as good a position as the claimant to prove the relevant facts. Moreover, there is some legal logic in the principle that a defendant should carry the burden of proof as to a defence.

2.158 However, under the discovery rule we will recommend, the limitation period begins when the claimant first knew, or should have discovered through reasonable investigation, certain basic facts related to the harm actually sustained by him. Is it reasonable to cast on the defendant the burden of proving that the claimant knew, or should have known, certain facts sufficiently early to give the defendant a limitations defence? We discussed the evidential problems as to this issue in paragraphs 2.19-20. When a claimant first knew something is based on his state of mind, and is a subjective matter peculiarly within his own knowledge. Moreover, the objective written or oral evidence of what a claimant was told will usually be more available to him than to the defendant. When the issue is when the claimant ought to have discovered the requisite knowledge, the objective evidence as to his particular situation will also probably be more readily available to the claimant. For these reasons we believe that a claimant should carry the burden of proving that his claim was brought within an applicable discovery limitation period.

2.159 We think that most of the modern limitations statutes we have considered are consistent with our conclusion, although with some the issue is not free from doubt. Under the 1982 Uniform Act and the B.C. Act, a limitation period which technically begins with the accrual of a claim is postponed and will not in fact begin until the claimant acquires the requisite knowledge. Procedurally, however, the limitation period would begin at the accrual of the claim unless someone proved that subsequent discovery resulted in postponement. Both the Uniform Act (subsection 13(4)), and the B.C. Act (subsection 6(5)), expressly impose the burden of proving a postponement on the person (the claimant) claiming the benefit of it.

2.160 Under the N.S.W. Act and the S.A. Act, the limitation period begins when a claim accrues. However, upon application by the claimant, the court is authorized to extend the applicable limitation period to a maximum of one year after discovery of the claim. Neither of these Acts expressly states that the applicant has the burden of proving his late discovery of the claim and hence that an extension is justified. Nevertheless, we believe that because of the procedure established by the statutes, which requires the applicant to apply for an extension of the limitation period, a court would impose the burden of proof on the applicant.

2.161 Neither the 1973 Scottish Act nor the 1980 English Act provide for either a postponement or an extension of an otherwise controlling limitation period beginning at accrual. Rather, for a claim subject to a discovery rule, the limitation period begins at discovery. Neither of these Acts resolves the burden of proof issue, and we are unwilling to speculate as to how a court would resolve it.

(8) Need for an ultimate limitation period

2.162 A limitations system usually contains provisions extending or suspending an applicable limitation period for a person under disability. However, a provision establishing an ultimate or maximum period of time limiting the duration of extensions or suspensions based on disability is also common. For example, subsection 46(3) of the present Alberta Act bars an action 30 years after the accrual of the claim, notwithstanding that the claimant was under disability when the claim arose. We will discuss the subject of persons under disability in Chapter 6 of this report.

2.163 When the beginning of a limitation period is governed by a discovery rule, a problem is created which is similar to that caused by the extension or suspension of a limitation period for a person under disability. A claimant may not be able to discover the facts required to activate the limitation period until decades after the occurrence of the events upon which his claim is based. Without an overriding ultimate limitation period, cases of this kind would prevent a limitations system which utilizes a discovery rule from achieving its objectives. Section 8 of the B.C. Act relies on a 30-year ultimate limitation period to solve this problem. Under section 8 no claim may be brought more than 30 years after its accrual, whether or not it could have been discovered with reasonable diligence during this period. Although we agree that a claim governed by a discovery rule should also be subject to an ultimate limitation period, usually beginning at accrual, we believe that a 30-year period is excessive when evaluated in terms of the reasons which require a limitations system.

2.164 In its 24th Report, the Law Reform Committee recommended that a discovery rule with a three-year limitation period be applied to claims for damages for property damage and economic loss, when the claim is based on negligence and involves a latent defect. Because a claimant might not acquire the requisite knowledge until many years after the negligent conduct, the Committee concluded that an ultimate limitation period, which they referred to as a "long stop", was required. The Committee recommended that the long stop period be 15 years. However, the Committee was concerned only with negligence claims involving latent defects. Under English law it is now clear that a negligence claim does not arise until the damage has occurred, and if there is a latent defect, the damage may not occur until many years after the negligent conduct. If the long stop period were to begin at the accrual of a claim, in delayed damage cases defendants would be vulnerable to stale claims for a virtually indefinite period, notwithstanding the long stop. Hence the Committee recommended that the long stop period begin at the time of a defendant's breach of duty, which they assumed was the time of the negligent conduct.

2.165 For us the need for a conclusive ultimate limitation period is not a difficult issue. Rather, we believe the crucial issues are the time of commencement and the duration of such a period. We will discuss these issues and state our recommendations in paragraphs 2.194-213.

E. The Institute Recommendations Regarding Limitation Periods

2.166 We have discussed the two historic limitation strategies at length. It is now clear that a new strategy, utilizing design elements from both of the classic models, is evolving through the current reform movement. Although we believe that the Alberta Limitations Act (hereafter the "new Alberta Act") should continue to combine elements from both the legal and equitable systems, in terms of its basic orientation, which depends on the operation of the limitation periods, we believe that it should rely to a much more significant degree on the equitable strategy. At this point we will provide a very brief overview of the strategy we have selected.

2.167 In Chapter 3 we will recommend which categories of claims should not be subject to any limitation provision, and which could, therefore, be brought at any time. Because of these claims, there would still be some characterization and categorization problems in the new Alberta Act.

2.168 All claims subject to the new Alberta Act would be governed by two limitation periods, and the defendant would be entitled to a limitations defence when whichever of these periods expired first. Because all claims subject to the new Alberta Act would be governed by both periods, problems of characterization and categorization would be eliminated for these claims.

2.169 One limitation period would begin when the claimant either discovered, or ought to have discovered, specified knowledge about his claim, and would extend for two years. We believe that, for the great majority of claims, this period would expire first. Because this period (hereafter referred to as the "discovery period") will depend on a discovery rule, the problems associated with accrual rules will be tremendously reduced.

2.170 The other limitation period (hereafter referred to as the "ultimate period") would extend for ten years, usually from the accrual of a claim. Although we do not believe that this period will strike down many claims, when it is the applicable period there may be accrual rule problems.

2.171 We would authorize the courts to deny equitable relief to a claimant even when the applicable limitation period under the new Alberta Act had not expired. However, the courts would not be granted any other discretion to shorten or lengthen an applicable limitation period.

2.172 We now proceed to our specific recommendations with respect to limitation periods.

(1) Legal effect of limitation periods

2.173 There is a threshold issue. What legal consequences should flow from the failure of a claimant to bring a claim within the applicable limitation period? There may be only procedural consequences, or there may be both procedural and substantive consequences.

(a) Procedural consequences

2.174 Procedurally, a limitations system gives a defendant a defence to a claim not brought within an applicable limitation period. This defence does not challenge the claim on its merits; it gives a successful defendant complete immunity from any liability under the claim regardless of the merits of the claim. We do not believe that these statements present any policy issue, for limitations statutes have, over the centuries, been uniformly interpreted as intended to create a defence for a defendant who successfully asserts such a statute. The problem is one of drafting, for limitations statutes in common law jurisdictions typically contain a provision similar to subsection 4(1) of the present Alberta Act, which prescribes that "The following actions shall be commenced within and not after the time respectively hereinafter mentioned . . . .". Literally, this provision expresses a public policy that an action *must* be commenced within the stated limitation period, with the consequence that the court should dismiss a tardy action even if the defendant does not raise a limitations defence. We do not believe that public policy requires a self-executing limitations statute which precludes a claimant from bringing an action after the expiration of an applicable limitation period. Rather, a claimant should be free to bring an action when he chooses, and the defendant should be given a defence to a tardy claim under a limitations statute which he can assert or not, at his option. Moreover, we think that this procedural consequence of a limitations statute should be stated in direct, clear and correct language.

> Recommendation 1
>
> We recommend that the new Alberta Act provide that: if a claim subject to this Act is not brought within the applicable limitation period, the defendant, upon pleading this Act as a defence, is entitled to immunity from liability under the claim.

(b) Substantive consequences

2.175 A claimant must allege that he has a right, he will usually allege that the defendant violated that right, and he will usually request a judicial remedy. When a defendant obtains an immunity from any liability under a claim pursuant to a limitations statute, he gains at least a procedural immunity from liability under the particular remedy the claimant requested. The issue of whether the claimant even had the alleged right will not have been determined, and if there is another remedy available, the claimant will remain free to assert it. Usually, however, the claimant will request that the court grant him one or more remedies selected from a group comprised of all of the possible remedies available under the law. If the defendant obtains a limitations defence to such a claim, procedurally, the claimant will no longer be able to enforce the alleged right at all relative to the particular alleged violation. However, if the claimant actually had the alleged right, it will remain intact. Frequently the right will be a one-time right, such as a right that the defendant perform a contract. If the defendant breached the contract, but obtains a limitations defence against any remedies available to the claimant under law to enforce the contract, the claimant will be left with a sterile right. A limitations statute can prescribe substantive as well as procedural consequences; it can provide for the extinguishment of an unenforceable right. We will discuss this issue in Chapter 9 of this report.

(2) Discovery limitation period

(a) Basic discovery rule

2.176 We will now present our conclusions as to the central issues involved in formulating a discovery rule, and will then state the basic discovery rule we favor in one formal recommendation.

2.177 We discussed the relationship between the accrual of a claim and a discovery rule in paragraphs 2.108-115. When a claim is to be governed by a discovery rule, the statute should state, clearly and directly, that the discovery period begins when the claimant acquires the requisite knowledge. We see no utility in providing for the postponement or extension of a limitation period otherwise beginning with the accrual of a claim.

2.178 We discussed the subject of the amount of knowledge which should be required under a discovery rule in paragraphs 2.116-125. We think that the discovery period should begin when the claimant discovers (1) that the injury for which he claims a remedy had occurred, (2) that the injury was to some degree attributable to conduct of the defendant, and (3) that the injury, assuming liability on the part of the defendant, was sufficiently serious to have warranted bringing an action. The impact of the first requirement, which may not be immediately apparent, can be demonstrated by an example based on a two-year discovery period. C's car was struck at the rear by a car driven by D1. C immediately discovered that the tail light on his car was broken. C felt the jolt of the impact and a slight twinge to his spine. Over the following two years C felt pains in his back, but attributed them to sore muscles caused by routine exercising. Three years after the accident C discovered that he had a serious spinal injury caused by the accident, and he could not reasonably have discovered this fact sooner. C promptly brought an action requesting a remedial order for damages for the spinal injury and for the broken tail light. It is quite possible that a court would conclude that C's action included two separate claims: one (claim 1) based on the serious spinal injury, and the other (claim 2) based on the damage to the tail light. As claim 1 was brought immediately after C discovered that he had a serious spinal injury, this claim was brought within the two-year discovery period. However, the two-year discovery period would have run against claim 2.

2.179 The discovery period will not begin until the claimant first knew that his injury was to some degree attributable to conduct of the defendant. We think that it would be quite unreasonable if the discovery period began before the claimant discovered any causal link between his harm and the defendant's conduct. It should be noted that, just as the discovery period may begin at different times for different injuries for which remedial orders are claimed, so the discovery period may begin at different times against different defendants. Continuing the previous example, assume that C learned, shortly after he brought his action against D1, that the accident had been caused, at least in part, by a failure of new brakes negligently installed in D1's car by D2. The discovery period applicable to a claim against D2 would not begin until C knew that his injury was to some degree attributable to conduct of D2.

2.180 The discovery period will not begin until the claimant first knew that his injury, assuming liability on the part of the defendant, was sufficiently serious to have warranted bringing an action. Potential claimants rarely seek the advice of lawyers until they perceive that they have suffered relatively serious harm; even business claimants have an aversion to incurring unnecessary legal expenses. A limitation provision which fails to accept this reality will not alter it, but will work injustice in the attempt. Even if a potential claimant does seek the advice of a lawyer, the lawyer will rarely recommend the expense of bringing an action unless he is reasonably certain that the harm suffered by the claimant will justify it. A limitation provision which encourages premature actions in the face of crowded court dockets thus serves neither claimants nor the legal system. We think that it would be impossible to frame an adequate statutory provision defining what circumstances would warrant bringing an action, for the circumstances will vary enormously depending on specific situations. There will be considerations which will be common to many cases. However, as these considerations will be patently obvious to experienced judges, we believe that a statutory list of them would be of dubious benefit to judges, and might unnecessarily constrain their judgment. When was harm sufficiently serious to have warranted bringing an action? Experienced trial judges are well equipped to answer such a judgmental question. The discovery rule should invite the judge to put himself in the claimant's shoes, to consider what knowledge he had at the relevant time, and to make the cost-benefit analysis which would be reasonable for the actual claimant.

2.181 We discussed the length of the discovery limitation period in paragraphs 2.142-149. The discovery rule is claimant oriented, for it is designed to adjust to the circumstances of a particular claimant and to give him a reasonable period of time to bring a specific claim. We think that a two-year discovery period is quite reasonable. The discovery period will not even begin to run until the claimant knew or should have known the three basic facts which trigger its operation, and he will be given two more years to consult a lawyer, to investigate the law and facts, to conduct settlement negotiations with the defendant, and to bring an action if necessary.

2.182 The subject of constructive knowledge was examined in paragraphs 2.127-132. We believe that the discovery rule should incorporate a constructive knowledge test which charges the claimant with knowledge of facts which, in his circumstances and with his abilities, he ought to have known. We reject the reasonable man standard in this context.

2.183 We discussed the question of what claims should be subject to a discovery rule in paragraphs 2.134-141. We believe that the discovery rule should be applicable to all claims governed by the new Alberta Act. On this issue we choose to follow the lead of South Australia. Our principal reason is based on justice. We acknowledge that most of the hardship cases which have arisen in the past have concerned undiscovered claims based on personal injury or property damage caused by negligent conduct. But there have also been undiscovered claims based on personal injury, property damage and other economic loss caused by intentional conduct, whether tortious or in breach of contract. If the primary concern is the claim which the claimant could not reasonably have discovered, as we think it is, we do not believe that a statute can fairly discriminate simply because there will be more claims in one possible category than another.

2.184 Moreover, we have another extremely important reason for applying a discovery rule across the board. We believe that the new Alberta Act should be as simple and comprehensible as reasonably possible. If only some claims are subject to a discovery rule, these claims will have to be defined. This will present categorization problems in drafting the legislation, and characterization problems for lawyers and the courts in applying it. In addition, the claims which are not subject to a discovery rule will have to be governed by fixed limitation periods beginning with the accrual of the particular claim. As to these claims the accrual rule problems will remain. Because one fixed limitation period beginning with the accrual of any claim cannot adjust to the different discovery periods which might be considered reasonable for different categories of claims, different categories of claims will have to be defined and matched to different fixed limitation periods. This will present further categorization problems in drafting the legislation and characterization problems for lawyers and courts in applying it. It is these problems which have been primarily responsible for making limitations law so incredibly complex that it can be likened to the mythical Augean Stables. We think that limitations law can and should be cleaned out through sensible law reform.

Recommendation 2

> We recommend that the new Alberta Act provide that: if a claim subject to this Act is not brought within two years after the date on which the claimant first knew, or in his circumstances and with his abilities ought to have known,
>
> (a) that the injury for which he claims a remedial order had occurred,
>
> (b) that the injury was to some degree attributable to conduct of the defendant, and
>
> (c) that the injury, assuming liability on the part of the defendant, was sufficiently serious to have warranted bringing an action,
>
> the defendant, upon pleading this Act as a defence, is entitled to immunity from liability under the claim.

(b) Burden of proof

2.185 In paragraphs 2.156-161 we considered the issue of burden of proof under a discovery rule. We believe that the claimant should carry the burden of proving that his claim was brought within the discovery period.

Recommendation 3

> We recommend that the new Alberta Act provide that: if the defendant pleads this Act as a defence, the claimant has the burden of proving that his claim was brought within the discovery limitation period.

(c) Successor owners and principals

2.186 Any limitations statute which contains a discovery period must prescribe whose knowledge will trigger the operation of the limitation period (1) when the claimant is a successor owner of a claim, (2) when the claimant deals through an agent, and (3) when the claimant is a successor owner of a claim as a personal representative of a deceased person.

2.187 The most common situation is that in which there is a successor owner of a claim who is not a personal representative of a deceased person. In this situation, in our view, the discovery period should begin when *either* a predecessor owner or the successor owner of the claim first acquired or ought to have acquired the requisite knowledge. This rule should apply when the successor owner has acquired the claim in *either* a commercial or a donative transaction, and it should draw no distinction between a successor owner who holds beneficially and one who holds in trust. The discovery period should begin if a predecessor owner first acquires the requisite knowledge. (1) In a donative transaction the predecessor should be responsible for conveying any knowledge he has to his successor, and (2) in a commercial transaction the successor should insure that he has obtained any knowledge possessed by his predecessor or obtained appropriate guarantees. However, the discovery period should also begin if the successor owner first acquires the requisite knowledge. The operation of this basic rule should not be conditioned on either the predecessor or the successor owner having acquired the requisite knowledge while the owner of the claim.

2.188 The second situation is that in which the claimant (the principal) has an agent. We believe that the discovery period should also begin if an agent first actually (but not constructively) acquired the requisite knowledge, if he had a duty to communicate that knowledge to his principal. This rule is based on the principle that if an owner of a claim chooses to deal through an agent, and if the agent has a duty to communicate certain knowledge to his principal, then the principal should be bound by the knowledge of his agent.

2.189 The third situation is that in which the claimant is a successor owner of a claim as the personal representative of a deceased predecessor owner. As a matter of policy, we believe that either the deceased owner of a claim or his personal representative should be given a full discovery period. However, translating this policy objective into sufficiently precise language is rather complex, for to achieve the policy goal the limitation period must begin against the personal representative at the earliest of three possible times.

2.190 The earliest point in time will occur when the deceased owner of a claim acquired or ought to have acquired the requisite knowledge more than two years before his death, but failed to bring an action. In this case the full discovery period would have run, and the defendant would have become entitled to immunity from liability under the claim, before the deceased died. We do not believe that limitations law should bar claims, and the claim would pass to the personal representative. However, in this case the discovery period should begin against the representative when it began against the deceased. The representative could bring the claim, and the defendant could assert his immunity, as they respectively choose.

2.191 The intermediate point in time will occur when the personal representative actually had the requisite knowledge at the time of his appointment. Assume this example. The deceased acquired the requisite knowledge and promptly discussed it fully with her daughter, who later became her personal representative. During the next 20 months the deceased visited a lawyer and he began an investigation of the facts and law. At the end of this 20 months the deceased was killed in an accident. One month later the daughter was appointed the personal representative of her mother's estate. If the discovery period began against the representative when either she or the deceased first acquired the requisite knowledge, the representative would have only three months left to bring an action. Indeed, if it had taken four months for the daughter to obtain the appointment, the discovery period would have expired before she even became the representative. Legally, one who may become a personal representative has no duty to do anything in that capacity until the appointment. Hence we believe that a personal representative should have a full discovery period beginning with the appointment even if he had the requisite knowledge before the appointment. However, the discovery period should begin against a personal representative at the time of appointment only if he actually had the requisite knowledge then; it would be quite inappropriate to attribute constructive knowledge, knowledge which one would have discovered through reasonable investigation, to one who has neither the duty nor the authority to make any investigation.

2.192 The last of the three possible times when the discovery period could begin against a personal representative will occur when he acquired or ought to have acquired the requisite knowledge after his appointment. In this case the discovery period either never began to run against the deceased, or did not run for two full years before the date of death. Assume that the discovery period began to run against the deceased one year before his death, and that the personal representative was a trust company named as Executor in the last Will. If the death were accidental, the deceased would almost certainly not have discussed the claim with the named Executor. Even a person who anticipated death from illness would seldom have the combination of strength and inclination required to perform such a business chore. If the discovery period began against the personal representative when it began against the deceased in this case, it would reflect a conclusion that the estate of a deceased, and hence his beneficiaries, should suffer the possible loss of a claim because the deceased failed to communicate knowledge to a named Executor when few persons could reasonably have been expected to do so, and when the named Executor had neither the right nor the duty to take any action based on the knowledge.

2.193 We have discussed the situation when there is an involuntary transfer of a claim to a personal representative because of the death of the owner. There may also be an involuntary transfer of a claim when an order for a person under disability is made under the Dependent Adults Act. This situation will be discussed in Chapter 6 of this report.

Recommendation 4

We recommend that the new Alberta Act provide that: the discovery limitation period begins

(a) against a successor owner of a claim when either a predecessor owner or the successor owner of the claim first acquired or ought to have acquired the requisite knowledge,

(b) against a principal when either

(i) the principal first acquired or ought to have acquired the requisite knowledge, or

(ii) an agent with a duty to communicate the requisite knowledge to the principal first actually acquired that knowledge, and

(c) against a personal representative of a deceased person as a successor owner of a claim, at the earliest of the following times:

(i) when the deceased owner first acquired or ought to have acquired the requisite knowledge, if more than two years before his death,

(ii) when the representative was appointed, if he actually had the requisite knowledge at that time, or

(iii) when the representative first acquired or ought to have acquired the requisite knowledge, if after his appointment.

(3) Ultimate limitation period

(a) Basic ultimate rule

2.194 We discussed the question of the need for an ultimate limitation period in paragraphs 2.162-165. We believe that any limitations system which utilizes a discovery rule should also have an ultimate limitation period. There are two fundamental issues: (1) when should the ultimate period begin, and (2) how long should it extend.

2.195 We will recommend that, for most claims, the ultimate period should begin with the accrual of the claim. This period is defendant oriented; its objective is to benefit the entire society of potential defendants by cleansing the slate as to any alleged breach of duty at some fixed point in time after it occurred. A breach of duty will be based on some act or omission of the defendant. A potential defendant can only begin counting at the time of his conduct, and he will frequently have no knowledge that particular conduct may have breached a duty owed to someone. Thus, in order to achieve its objective as a provision of repose, the ultimate period must begin when a person did, or failed to do, something. As most claims will accrue at the time of the defendant's conduct, beginning the ultimate period at the accrual of a claim will usually be quite functional. However, this will not always be so.

2.196 We discussed the accrual rule problems at some length in paragraphs 2.79-103. In some cases beginning a limitation period at the accrual of a claim produces an unsatisfactory result insofar as limitations policy is concerned. In some cases the uncertainty of the accrual rules produces problems. Because the limitations system we propose will subject all claims to a discovery period, and because this will be the relevant limitation period for the great majority of claims, the accrual rule problems will be greatly diminished in practice. We will subsequently make recommendations designed to resolve the accrual rule problems with respect to specific types of claims where they have been most troublesome.

2.197 The crucial issue is the duration of the ultimate limitation period. In Chapter 1 we presented a considered discussion of the reasons for a limitations system. Within ten years after the occurrence of the events on which the overwhelming majority of claims are based, these claims will have been either abandoned, settled, litigated or become subject to a limitations defence under the discovery rule. The class of remaining potential claimants will have become very small, but without an ultimate period, the entire society of potential defendants will remain subject to a tiny group of claims. The reasons for a limitations system based only on peace and repose, and economics, would in our judgment justify an ultimate period of ten years. Insofar as alleged human transgressions are concerned, the slate should be cleaned at this time for the peace and repose of the collective society and its individual members. By this time the cost burden imposed on potential defendants, and through them on the entire society, of maintaining records and insurance to secure protection from a few possible claims will have become higher than can reasonably be justified relative to the benefits which might be conferred on a narrow class of possible claimants.

2.198 It is, however, the evidentiary reasons for a limitations system which compel us to select an ultimate period of ten years. We recognize that any ultimate period will result in the denial of a remedy to some claimants with meritorious claims which could not with reasonable attention have been discovered before the expiration of this period. Obviously, more claims will be caught by a period of ten years than by one of 30 years, although we think that the difference will be exceedingly slight. We have little doubt that it was sensitivity to the plight of meritorious claimants which led to the choice of 30 years in the B.C. Act. But, with the greatest respect to those who made this judgment, we do not think that it gives proper weight to the interests of defendants. Many claimants do not prevail in litigation because many claims are not meritorious. The judicial system must, insofar as possible, ensure that the adjudicative process secures justice for claimants and defendants. By the time that ten years have passed after the occurrence of the events on which a claim is based, we believe that the evidence of the true facts will have so deteriorated that it will not be sufficiently complete and reliable to support a fair judicial decision. At this point adjudication will as likely result in a judicial remedy for a claimant with a spurious claim as one with a meritorious claim. Adjudication under these circumstances can only detract from the credibility of the judicial system, and undermine its effectiveness. The judicial system is a human system, and we think it is counterproductive for a society to require it to attempt to do what it cannot do properly. We quote from the opinion of Laycraft, J.A. in the *Ruzicka* case:[26]

> Every trial judge is aware that stale claims with stale testimony produce bad trials and poor decisions.

> Recommendation 5
>
> We recommend that the new Alberta Act provide that: unless a claim subject to this Act is brought within ten years after the claim arose, the defendant, upon pleading this Act as a defence, is entitled to immunity from liability under the claim.

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[26] 54 A.R. 385, at 392.

(b) Ultimate rule for specific claims

2.199 Most claims will accrue, as a matter of law, at the time of the defendant's conduct: when he did, or failed to do, something. However, some claims will accrue at a different time, and when this happens the accrual rule does not serve the objectives of limitations law. In addition, sometimes the general law does not clearly establish when a claim does accrue. We have identified five types of claims for which the accrual rules have been particularly troublesome in the context of limitations law. We believe that specific provisions should be made stating when the ultimate period should begin for each of these claims. We emphasize that we will not recommend provisions stating when these claims accrue, for when a claim should accrue under the general law will frequently depend on a different set of policy considerations than those which should dictate when a limitation period should commence. We will make our formal recommendation at the conclusion of our discussion of these five types of claims.

(i) Duty of care

2.200 The limitation problems which result from the accrual rules applicable to claims based on the breach of a duty of care were examined in paragraphs 2.90-102. We believe that the ultimate period for a claim based on the breach of a duty of care should begin when the careless (negligent) conduct occurred, and that for this purpose it is immaterial whether the duty of care was based on tort, contract, statutory duty or otherwise. This rule should apply to any claim which includes damage as a constituent element. Damage is a constituent element of a claim based on the breach of a duty of care, and hence careless (negligent) conduct is not legally wrongful unless it results in harm. Under the general law it is now clear that a claim based on the breach of a duty of care does not accrue until there is damage, and it may accrue at a later time. In the *Kamloops* case the Supreme Court of Canada appears to have held that such a claim does not arise until the claimant first discovered the damage, or could with reasonable diligence have discovered it. As the law evolves the claim may not arise until the claimant discovered, or ought to have discovered, even more information about the claim. The two-year discovery period which we have recommended will not begin until the claimant discovered, or should have discovered, the damage and further relevant information. However, if the ultimate period is to achieve its objective of securing repose for the society of potential defendants, this period must begin at the time of a defendant's negligent conduct, even though that conduct will not be legally wrongful unless it produces damage at some time, perhaps many years later. We recognize that, under our recommendation, the ultimate period for a claim based on the breach of a duty of care may expire before the claim has even accrued, for the damage may not have occurred by that time, and even if it has, the claim may not have accrued under the discovery rule enunciated in the *Kamloops* case. This problem of legal principle was also recognized by the Law Reform Committee in its 24th Report. Nevertheless, as we pointed out in paragraph 2.164, this Committee reached the same conclusion we had come to, because there is no feasible alternative consistent with limitations policy. The Committee recommended that the long stop limitation period for a claim based on negligence should begin at the time of the breach of duty, which the Committee equated with the time of the negligent conduct.

(ii) Course of conduct

2.201 We believe that the ultimate period for any number of claims against a defendant, based on any number of breaches of duty, resulting from a continuing course of conduct or a series of related acts or omissions, should begin when the conduct terminated or the last act or omission occurred. Normally the ultimate period begins when a claim accrues, and the concept of a claim (or a cause of action) is fundamental to the common law. Nevertheless, and in spite of profound efforts by jurists and academics for decades, the common law has never accepted a definition of a claim of general and functional application. This most frequently creates problems in the law of civil procedure. In this area both courts and legislatures have attempted to solve these problems pragmatically in the specific contexts in which they have arisen.

2.202 The lack of a generally applicable definition of a claim creates problems in limitations law which are particularly acute when the legally wrongful conduct consists of a continuing course of conduct or a series of acts or omissions so closely related as to constitute a course of conduct. The problems come in two basic variants, which can be discussed in two examples. (1)D's factory emitted fumes which continuously drifted over C's farm and which, in the course of time, harmed both him and his fruit trees. (2)D exposed C, an employee, to nuclear radiation periodically (daily, weekly, or monthly) which, in the course of time, harmed him. In example (1) there could be three breaches of duty, based respectively on trespass, negligence and a statute; there could be three distinct claims; and they could accrue at different times. Or, focusing on C's harm rather than the basis of legal liability, there could be two claims, one for personal injury and one for property damage. Or, focusing on D's conduct, there could be one claim based on his continuous wrongful conduct. Example (2) lends itself to similar but more difficult analysis because of the periodic acts. Each exposure of C to radiation could be considered a separate breach of a particular duty producing multiple claims. Moreover, because of changing government safety regulations in the nuclear industry, D's wrongful conduct might have consisted of different acts or omissions at different times, which violated different regulations and hence different duties, and which produced multiple claims.

2.203 Insofar as the objectives of limitations law are concerned, it doesn't matter how many breaches of duty there were, how many different duties were breached, how many claims there are, or when they accrued, if the claims all resulted from a continuing course of conduct or a series of related acts or omissions. In this situation the policy issue is when should the ultimate period begin: when the legally wrongful conduct began or when it ended. Assume that, in both examples in the preceding paragraph, D's conduct stopped exactly ten years from the date that it started. If the ultimate period begins when the conduct started, D will be entitled to assert his immunity from liability under C's claims a moment after D's conduct stopped. The reasons for a limitations system based on evidence and repose do not require this harsh result. Stale evidence should not present a significant problem, for the evidence will have continually renewed itself with D's repetitive conduct. Justice does not require giving D repose for wrongful conduct which just stopped. Hence we believe that the ultimate period should begin when the conduct ended.

(iii) Demand obligation

2.204 We discussed the accrual rule for a claim based on a demand debt in paragraph 2.86. We believe that the ultimate period for a claim based on a demand obligation should begin when a default in performance occurred after a demand for performance was made. As a demand obligation will usually be a promise to pay a debt on demand, that example will be used. For technical historical reasons a claim based on a demand debt accrues when the debt arose rather than when a demand for payment was made. Consequently, if the ultimate period began at the accrual of this claim, and if C (the creditor) demanded payment of the debt more than ten years from the date the debt arose, D (the debtor) would already be entitled to assert his immunity from liability under C's claim. Insofar as limitations law is concerned, we do not think that it makes sense to consider D as having breached a duty to pay a demand debt before a demand for payment was ever made. The practical result of our proposal is that the ultimate period will probably never run against a demand obligation, for when C demands payment, if D fails to pay, C will know that he is being harmed and the two-year discovery period will begin to run.

(iv) Fatal Accidents Act

2.205 We believe that the ultimate period for a claim under the Fatal Accidents Act[27] should begin upon the occurrence of the conduct which caused the death upon which the claim is based. The policy issue here is similar to that we discussed in paragraph 2.200 in connection with a claim based on the breach of a duty of care. Under subsection 3(1) of the Fatal Accidents Act, the court may award damages to claimants under the Act appropriate to the injuries they suffered resulting from the death. Consistent with this, section 54 of the present Alberta Act imposes a two-year limitation period beginning with the death of the person upon whose death the claim is based. The problem is that, just as careless conduct may have occurred many years before it results in damage, and the possible accrual of a claim, so the conduct which eventually causes a death may have occurred more than a decade before the resulting death. If the ultimate period is to give meaningful protection to defendants, it must begin at the time of a defendant's conduct. Under section 54 of the present Alberta Act, any defendant whose conduct contributed to the injury of a person is vulnerable to a claim, for two years after the death of the person and possibly many years after the conduct in question, alleging that the injury, and hence the defendant's conduct, contributed to the death. We believe that, when there is a causal link between a defendant's conduct and the death of a person, the death will, in the overwhelming majority of cases, occur within ten years of the defendant's conduct. However, because of section 54, a large group of possible defendants will be exposed to undue risk unless they maintain protective records and insurance coverage for very prolonged periods. We do not believe this result is consistent with limitations policy.

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[27] R.S.A. 1980, c. F-5.

(v) Contribution

2.206 We believe that the ultimate period for a claim for contribution should begin when the claimant for contribution was made a defendant under, or incurred a liability through the settlement of, a claim seeking to impose a liability upon which the claim for contribution could be based. The reasons for and the operation of this proposal can be best discussed in terms of an example. C was injured in an automobile accident, and the tortious conduct of three persons, D1, D2 and D3, contributed equally to cause the injury. C could obtain a judgment for his full damages against any one or all of these tort-feasors. However, under the common law rule, if any one of them, say D1, satisfied the judgment, he could not require either of the others to reimburse him for, or contribute, their fair one-third share of the damages. The Alberta Tort-Feasors Act[28] gives any tort-feasor who has been held liable for the damages a right to recover contribution from any other tort-feasor who has been or could be held liable for the same damages. However, the Tort-Feasors Act does not expressly state when a claim for contribution accrues.

2.207 Unfortunately, when the ultimate period for a claim for contribution should begin raises a complex and difficult issue. Any one of three different times could have been selected, and these three options are discussed below.

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[28] R.S.A. 1980, c. T-6.

2.208 First, the ultimate period for a contribution claim by any one of the three tort-feasors could begin when C's claim accrued against him. This is the earliest possible commencement time for the ultimate period. In the preceding example, assume the following facts. The accident occurred on January 1, 1970; C's claims against D1, D2 and D3 accrued at that time; C discovered the requisite facts required by the discovery rule as to D1 roughly nine years later, and C could not reasonably have discovered them sooner; C brought a claim against D1 in late December 1979; D1 was completely surprised by the claim; D1 hired a lawyer and factual investigations were begun; in July 1980 D1 discovered that D2's conduct contributed to C's injury; and at that time D2 remained unaware that either C or D1 had any claim against him. D1 would like to join D2 to the proceeding previously commenced by C, and to bring a claim for contribution against D2. But to what avail? If the ultimate period against D1's contribution claim against D2 began when C's claim against D1 accrued, 10 and 1/2 years would have passed and D2 would be entitled to assert his immunity from liability under D1's claim. In Chapter 5 of this report we will consider the subject of claims added to a proceeding previously commenced. We will recommend a provision under which D2 would lose his limitations defence against D1's claim if D2 obtained certain specified knowledge of D1's claim during the limitation period applicable to that claim. As the assumed facts state that D2 was unaware that either C or D1 had a claim against him, D2 would not lose his limitations defence.

2.209 Secondly, the ultimate period for a contribution claim could begin when liability upon which a claim for contribution is based is finally imposed on a claimant for contribution. This is the latest possible commencement time for the ultimate period. Continuing the preceding example, assume that C's claim against D1, which was brought in December 1979, went to trial in July 1982; that a judgment imposing liability upon D1 was granted; and that D1's liability became final under an appellate decision given in July 1983. The ultimate period on D1's claim for contribution against D2 would begin in July 1983, when liability to C was finally imposed on D1. A strong argument can be made, based on sound legal theory, that a claim for contribution cannot accrue until the liability upon which it is based has been imposed, and that the limitation period applicable to the claim should begin then. How could D2 have a duty to contribute to the satisfaction of D1's liability before any liability has been imposed on D1 in favor of C? Clause 3(1)(c) of the Tort-Feasors Act supports this argument, for it says "(c) any tort-feasor liable in respect of that damage may recover contribution from any other tort-feasor who is or would, if sued, have been liable in respect of the same damage . . . ." In short, D1 has a right to contribution only if he *is* liable to C, but if that condition is met, D2 will have a duty to contribute merely because he *would be* liable to C if sued. Nevertheless, under this option the ultimate period applicable to D1's claim for contribution against D2 would not even begin until July 1983, three and one-half years after C brought the original claim against D1 in December 1979.

2.210 Thirdly, the ultimate period for a contribution claim could begin when the claimant for contribution was made a defendant under a claim seeking to impose a liability upon which the claim for contribution could be based. Relative to options

(1) and (2), this is an intermediate commencement time for the ultimate period, and it is the option we have selected. Under this option the ultimate period on D1's claim for contribution against D2 would begin in December 1979, when C brought his claim against D1. The theoretical defect inherent in this solution was discussed in the preceding paragraph; the limitation period applicable to D1's claim for contribution from D2 will begin before D1's claim accrued, for unless and until D1 is liable to C, D1 will have no right to contribution from D2. However, our proposal as to negligence claims tolerates the same theoretical impurity, for the ultimate period applicable to a negligence claim can begin before the damage has occurred and hence before that claim accrued. Nevertheless, as a practical matter, once D1 becomes a defendant under any claim he will begin to investigate the facts, and if it is a tort claim he will have a strong incentive to learn whether or not there are any other tort-feasors who would in the future have a duty to contribute and hence to reduce his ultimate economic loss. In short, option (3) gives a claimant for contribution ample time to take steps to find other persons to share the potential liability.

2.211 There are frequently a string of defendants in a tort situation. In the example under consideration, assume that D1 was the negligent driver whose car struck C's car; that D2 was a repair garage which was negligent in repairing the brakes on D1's car before the accident; that D3 was the manufacturer of defective parts which D2 installed in D1's car in connection with the repair job; and that D1 brought a claim for contribution against D2 in December 1980. It is D2, rather than C or D1, who is most likely to discover that D3's conduct contributed to C's injury. Under option (3) the ultimate period applicable to D2's claim for contribution against D3 would begin when D2 was made a defendant under D1's claim for contribution in December 1980, and would not expire until ten years later. As a matter of practical reality this problem is more a matter of sound than fury. When any tort-feasor is made a defendant in a civil proceeding which originated with a tort claim, it is in his interest to make all reasonable efforts to discover all other tort-feasors liable for the damages, to join them to the proceeding, and to bring claims for contribution as soon as possible. Consequently, if a claimant for contribution does not bring a timely claim for contribution, it is most probable that the two-year discovery period will strike the claim long before the expiration of the ultimate period.

2.212 We think that option (1) would be unduly harsh on a claimant for contribution if the original tort claim were brought near the end of the ultimate period applicable to that claim, that option (2) would unnecessarily extend the operation of the ultimate period, and that option (3) is the fairest and most practical compromise.

2.213 Our recommendation will also cover the situation when a claimant for contribution incurred a liability through the settlement of a claim. Of course there is no right of contribution unless it is created by the Tort-Feasors Act, and no right is presently created in this situation. Nevertheless, most modern statutes on this subject do create a right of contribution based on a settlement, and it is reasonable to assume that Alberta will adopt this change at some time. When it does, an applicable limitation provision will be available, and in the meantime the provision will do no harm.

Recommendation 6

We recommend that the new Alberta Act provide that: for the following claims the ultimate limitation period begins at the times prescribed below:

(a) a claim based on a breach of a duty of care, when the careless conduct occurred;

(b) any number of claims, based on any number of breaches of duty, resulting from a continuing course of conduct or a series of related acts or omissions, when the conduct terminated or the last act or omission occurred;

(c) a claim based on a demand obligation, when a default in performance occurred after a demand for performance was made;

(d) a claim under the Fatal Accidents Act, when the conduct which caused the death, upon which the claim is based, occurred;

(e) a claim for contribution, when the claimant for contribution was made a defendant under, or incurred a liability through the settlement of, a claim seeking to impose a liability upon which the claim for contribution could be based.

(c) Burden of proof

2.214 Under the present law the defendant has the burden of proving that a claim *was not* brought within a limitation period which begins with the accrual of the claim. In paragraph 2.157 we stated our approval of this rule. However, in paragraph 2.185 we recommended that the new Alberta Act contain an express provision imposing on the claimant the burden of proving that a claim *was* brought within the discovery period if the defendant asserts a limitations defence. In order to avoid any ambiguity, we believe that the new Alberta Act should also contain an express provision as to the burden of proof for the ultimate period.

> Recommendation 7
>
> We recommend that the new Alberta Act provide that: the defendant has the burden of proving that a claim was not brought within the ultimate limitation period.

(4) Judicial discretion regarding equitable claims

2.215 We stated our opinion that the courts should not be authorized to either shorten (paragraph 2.151) or extend (paragraph 2.154) the discovery period, and no such discretion is included in our recommendations with respect to the discovery period. Similarly, our recommendation with respect to the ultimate period does not confer any discretion on the courts.

2.216 However, in paragraph 2.152 we discussed an exception to our general policy which we believe must be made for claims requesting equitable remedies. We believe that a court should be authorized to deny a claimant an equitable remedy under the equitable doctrines of acquiescence or laches, notwithstanding that the defendant would not be entitled to a defence under either the discovery or ultimate periods.

> Recommendation 8
>
> We recommend that the new Alberta Act provide that: nothing in this Act precludes a court from granting a defendant immunity from liability to an equitable remedy, under the equitable doctrines of acquiescence or laches, notwithstanding that the defendant would not be entitled to immunity pursuant to this Act.

CHAPTER 3. APPLICATION

3.1 One of the most important subjects to be considered in developing a limitations system is the coverage of the system; it is necessary to determine what types of claims should be subjected to the limitations system at all. In this connection, we must draw a distinction between the coverage of the Alberta limitations system and the coverage of any Alberta Limitations Act as the central statute within that system. Assuming that a type of claim should be subjected to limitation provisions, should the claim be covered by the new Alberta Act, or should the limitation provisions applicable to the claim be included in a specialized Alberta statute dealing generally with that type of claim? Many types of claims are now subject to limitation provisions in statutes other than the present Alberta Act. We will discuss the limitation provisions in these other Alberta statutes in paragraphs 3.97-117.

A. Basic Application Rule

3.2 We believe that, to the extent that the claim is subject to the legislative jurisdiction of Alberta, the new Alberta Act should apply to any civil judicial claim requesting a remedial order, other than a claim within this definition which is expressly excluded from the application of the Act.

3.3 All the modern limitations statutes we have considered attempt to secure a comprehensive coverage. The normal drafting strategy is to use a catch-all clause. Any claim which is neither: (1) expressly described and assigned to a limitation period in the statute, (2) expressly described and excluded from the coverage of the statute, nor (3) specifically provided for in another statute, is subject to the limitation provisions of the catch-all clause. Clause 4(1)(g) of the present Alberta Act provides a typical example of this drafting strategy. It provides:

> 4(1) The following actions shall be commenced within and not after the times respectively hereinafter mentioned:
>
> (g) any other action not in this Act or any other Act specifically provided for, within six years after the cause of action therein arose.

We point out here that one of the problems with the present Alberta Act is that it does not expressly describe and exclude from its coverage many claims which are probably not intended to be covered. Indeed, the only claims for which the present Alberta Act expressly provides that no limitation period is applicable are certain claims against trustees described in sections 40 and 41.

3.4 We agree with the current comprehensive coverage approach. However, because the limitations strategy we have recommended will subject all claims covered by the new Alberta Act to the same two concurrent limitation periods, we need only define the claims to which the Act should apply in broad terms, and expressly describe and exclude those specific claims which are included in the broad definition but which should not be covered by the Act. Because our basic recommendation will limit the application of the Act to any civil judicial claim requesting a remedial order, it will inherently exclude certain other categories of claims.

(1) Civil (not criminal) claims

3.5 Limitations sytems are concerned with claims brought in civil proceedings; they do not apply to criminal proceedings. Hence under our recommendation the new Alberta Act will only apply to civil claims.

(2) Judicial (not administrative) claims

3.6 Similarly, limitations systems are concerned with claims brought in judicial proceedings, with claims brought before courts; they are not usually applicable to claims in ministerial or administrative proceedings. Although it may be appropriate to limit the time available to a claimant for seeking ministerial or administrative action, the policy considerations relevant to these claims will frequently differ from those relevant to judicial claims. Hence under our recommendation the new Alberta Act will only apply to judicial claims.

(3) Post-claim time periods

3.7 We have recommended that unless a claim subject to the new Alberta Act *is brought* within the applicable limitation period, the defendant will be entitled to assert his immunity from liability under the claim. Many Alberta acts and regulations establish time constraints governing procedures which may be followed in the course of litigation *after* a judicial action is begun. For example, procedural time constraints are often applicable to interlocutory motions and appeals. As these procedural time constraints are relevant to the conduct of litigation of a claim already before a court, they do not limit the time available for bringing a claim, and are not considered to be within the proper scope of a limitations system. We think that our recommendation makes it clear that the new Alberta Act will impose time constraints only to the bringing of claims.

(4) Federal jurisdiction

3.8 In paragraph 3.2 we said that we believe that the new Alberta Act should apply to any civil judicial claim requesting a remedial order, to the extent that the claim is subject to the legislative jurisdiction of Alberta. (1) Any claim which arose under the substantive law of Alberta and which is brought before an Alberta court will be subject to the legislative jurisdiction of Alberta, and should be subject to the Act. (2) Any claim which arose under the substantive law of another province or of a foreign state but which is brought before an Alberta court will be subject to the legislative jurisdiction of Alberta. The issue here is whether or not Alberta should assert its jurisdiction to apply the Act to these claims. That is a conflict of laws issue which will be discussed in Chapter 4. (3) Any claim which is brought before a court created by another province or by a foreign state is not subject to the legislative jurisdiction of Alberta, and this jurisdictional reality does not concern us.

3.9 This leaves the following two types of claims which do concern us: (1) any claim which arose under the substantive law of Canada and which is brought before an Alberta court, and (2) any claim which arose within Alberta and which is brought before a federal court. The problems with respect to these two types of claims exist because Alberta is part of a federal state, and because the Parliament of Canada has legislative jurisdiction over claims arising under its substantive law, and may have legislative jurisdiction over claims brought before its courts.

(a) Federal law

3.10 In Canada, by way of example, actions for divorce, actions with respect to patents, copyrights and trade marks, and maritime law actions arise under substantive federal law. Some areas of law are subject to exclusive federal jurisdiction. Although Parliament can subject claims in these areas to applicable provincial limitations law, the extent to which it has done this is sometimes uncertain. In other areas of law there may be dual legislative jurisdiction, with federal jurisdiction paramount. Federal legislation on a subject would preempt that subject area. However, the extent to which federal legislation on a subject actually occupies an entire subject area, and hence preempts provincial legislation, is sometimes uncertain.

3.11 We want to make it certain that any claim which arose under substantive federal law, and which is brought before an Alberta court, is subject to the new Alberta Act to the extent that the Act can be made applicable to it. Our reason is that we want to insure that a claim which is not in fact subject to limitation provisions under federal law is not left in a limitations hiatus because Alberta failed to assert a legislative power which it had.

3.12 It may be that a provision applying the new Alberta Act to a claim not otherwise excluded "to the extent that the claim is subject to the legislative jurisdiction of the Province" would be sufficient. Literally, such a provision would include a claim arising under substantive federal law. We think, however, that an express inclusive reference to any claim arising under federal law is preferable.

(b) Federal courts

3.13 Similarly, we want to make it certain that any claim which arose within Alberta, and which is brought before a federal court, is subject to the new Alberta Act to the extent that the Act can be made applicable to it. For this purpose the crucial point is that the claim arose in Alberta; it makes no difference whether the claim arose under federal substantive law or Alberta substantive law, or whether the claim is brought before a federal court in Alberta or somewhere else in Canada. Again, we want to insure that a claim which arose in Alberta and which is brought before a federal court will not be in a limitations void because neither jurisdiction applied limitation provisions to it.

3.14 It seems clear that Parliament has granted a province legislative power to apply its limitations law to a claim in this situation, for subsection 38(1) of the Federal Court Act[29] provides:

> 38.(1) Except as expressly provided by any other Act, the laws relating to prescription and the limitation of actions in force in any province between subject and subject apply to any proceedings in the Court in respect of any cause of action arising in such province. . . .

It may be that this subsection *does* apply Alberta limitations law to the claims we are considering, and that no express application provision in the new Alberta Act is needed. However, this is a technical field of law, and a court might hold that Alberta limitations law applies in this situation only if Alberta legislation makes it applicable. We prefer to avoid any possible uncertainty on this issue.

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[29] R.S.C. 1970 (2nd Supp.), c. 10.

(5) Remedial claims

3.15 We introduced the subject of remedial orders in paragraphs 1.15-17. Under our recommendation, the new Alberta Act will apply only to remedial claims, that is, to claims requesting one or more remedial orders, and this will inherently exclude certain other categories of claims. We do not think that this will change the limitations law of Alberta. Rather, we think that it will merely implicitly exclude categories of claims which the courts have customarily held to be beyond the appropriate and intended scope of limitations law in terms of its policy objectives.

3.16 A remedial order is a judgment or an order made by a court in a civil proceeding requiring a defendant to comply with a duty or to pay damages for the violation of a right. The foundation or substantive base of our law is a series of what are sometimes referred to as primary right-duty relationships. For every right enjoyed by a person one or more other persons are subject to a correlative duty. These right-duty relationships are usually based on personal status, contract, trust, restitution, property or statute. Whenever one brings a claim before a court he must allege the existence of facts which produce a right-duty relationship; the claimant must assert, either expressly or impliedly, a right on his part and a correlative duty on the part of the defendant. Occasionally only the existence or extent of the right-duty relationship may be in dispute in a case, and if so the claim will request only a judicial declaration recognizing and defining the terms of the relationship.

3.17 Usually, however, the claim will go further and will allege that the defendant breached a duty owed to the claimant and will request a remedial order. Although courts are empowered to select from an extensive and varied arsenal of remedies, when subjected to critical analysis, these remedies fall into two categories. (1) A remedial order may require a defendant to comply with a duty. Remedies in this category are often called performance oriented remedies. The defendant may be required to comply with an affirmative duty to do something, or with a negative duty to refrain from doing something. (2) A remedial order may require a defendant to pay damages for the violation of a right. Remedies in this category are often called substitutionary remedies. The defendant may be required to pay compensatory or punitive damages for the violation of a right in substitution for the performance of a duty which is no longer either possible or feasible.

3.18 Although, on occasion, neitner the lawyer who requests a remedial order nor the judge who grants it will consciously consider the matter, a remedial order is always based on a right-duty relationship, and consequently implicitly recognizes and defines the terms of that relationship to the degree required to support the remedial order. The important point is that a remedial order goes further and enforces the right-duty relationship. Because the objective of the new Alberta Act is to limit the time available to a claimant for bringing a claim requesting a remedial order to a reasonable period of time, our recommendation limits the application of the Act to any claim requesting a remedial order.

Recommendation 9

> We recommend that the new Alberta Act provide that: except as otherwise provided, this Act is applicable to any civil judicial claim requesting a remedial order, including a claim to which this Act can apply arising under any law that is subject to the legislative jurisdiction of the Parliament of Canada, if the claim either
>
> (a) is brought before a court created by the Province, or
>
> (b) arose within the Province and is brought before a court created by the Parliament of Canada.

B. Nonremedial Claims

3.19 We will now discuss two types of claims which are not remedial claims at all. These are (1) claims for declarations and (2) claims for enforcement orders. Our basic recommendation that the new Alberta Act apply only to a claim requesting a remedial order implicitly excludes these two types of claims from the coverage of the Act. However, because of the critical importance of these exclusions, we believe that they should be explicitly stated in the Act.

(1) Declarations

3.20 The subject of declarations was introduced in paragraph 1.14. We do not believe that the new Alberta Act should be applicable to a claim requesting a declaration of rights and duties, legal relations or personal status. In this respect we think that the Act should codify the judicial interpretations of limitations statutes which have left this issue uncertain. Rights and duties based on personal status, contract, trust, restitution, property and statute exist under the law without any necessary reference to the courts, and persons usually comply with their duties without judicial coercion. Frequently, however, interested persons will have a genuine dispute as to the scope of their respective rights and duties. The Act would not limit the time available to a claimant whose claim requests: (1) the interpretation of a legal document such as a mortgage, a lease, a contract, a will or a trust; (2) a declaration of personal status resulting from marriage, divorce or parentage; or (3) a declaration of the priority of interests in land under the Land Titles Act. In these situations the interpretation of the legal document, the declaration of personal status, and the declaration of the priority of the interest will operate as a declaration of the rights and duties under the legal document, or which arise from the personal status, or which arise from the priority of the interest.

3.21 Similarly, the Act would not apply to a claim requesting a declaration of legal relations, such as: (1) the relationship between a person with a power (an agent) and a person under a liability to have his rights and duties altered if the power is exercised (the principal); and (2) the relationship between a person who has gained an immunity from liability under a power and a person under a disability to exercise the power.

3.22 A declaration of rights and duties, legal relations or personal status has no creative effect. Rather, it reflects a judicial determination of what rights and duties, legal relations or personal status existed under the law before the declaration, albeit in dispute, and declares what they were and are. Properly understood, a declaration is not a judicial remedy for it remedies nothing; it does not order anyone to do, or to refrain from doing, anything. The interested persons may leave the court in peace and comply with their duties as defined in the declaration without further resort to the judicial process. Only if a claim is brought before a court alleging a breach of duty and requesting a remedial order will the court be in a position to consider granting a remedial order. At that time the issue of whether or not the defendant is entitled to immunity from liability under the claim under the Act may arise.

Recommendation 10

> We recommend that the new Alberta Act provide that: this Act is not applicable to a claim requesting a declaration of rights and duties, legal relations or personal status.

(2) Enforcement orders

3.23 The subject of enforcement orders was introduced in paragraphs 1.18-19. We do not believe that the new Alberta Act should be applicable to a claim requesting the enforcement of a remedial order. An enforcement order could be defined as an order or writ made by a court for the enforcement of a remedial order. Functionally, a court is engaged in four distinct processes in a civil proceeding. (1) It must identify and define the right-duty relationship upon which the claim is based. (2) It must determine whether a breach of a relevant duty has occurred. (3) It must select an appropriate remedy and grant a remedial order. (4) It must issue such further orders or writs as may be required to enforce the remedial order granted. An enforcement order is made during the fourth process. After a court has granted a remedial order directing a defendant, for example, to pay a sum of money or to surrender possession of real property under a judgment, the defendant may remain obdurate. If so, an enforcement order, such as a writ of execution or a writ of possession, may be issued. We do not think that a definition of an enforcement order should be attempted. As the types and specific characteristics of these orders may be varied over time and as they are the subject of extensive provisions in the Alberta Rules of Court, we think that a general reference to a claim for the enforcement of a remedial order offers an adequate and practical solution.

3.24 Claims requesting enforcement orders should be excluded from the coverage of the Act for two reasons. (1) The Act is designed to insure that claims requesting remedial orders are brought within a reasonable time, and an enforcement order will not be issued unless the initial claim was brought within the prescribed limitation period and the objectives of the Act were satisfied. (2) Enforcement orders are procedural in nature and are governed by the Rules of Court. If the time available to a claimant to request an enforcement order should be limited, the limitation should be included in the Rules of Court.

Recommendation 11

> We recommend that the new Alberta Act provide that: this Act is not applicable to a claim requesting the enforcement of a remedial order.

(3) Judgment for payment of money

3.25 A type of enforcement order which does concern us is one for the enforcement of a remedial order for the payment of money. Indeed, because a large percentage of the remedial orders granted by courts will direct the payment of money, a large percentage of enforcement proceedings will involve these orders. A claimant who obtains a judgment for the payment of money will usually take prompt steps to attempt to enforce it. He may collect all of the judgment debt, part of it, or none of it through enforcement proceedings. Moreover, if the judgment debtor has no assets or is out of the jurisdiction, the judgment creditor may not even attempt prompt enforcement. There is a problem inherent in this situation which is analogous to that which requires limitation provisions for claims requesting remedial orders, for with the passing of time the defendant's evidence of what payments he has made, if any, will deteriorate. Without limitation provisions applicable to enforcement orders in this situation, defendants will have to preserve evidence of payments forever.

3.26 At the outset we wish to distinguish two different, albeit related, subjects. Here we are concerned with the need for limitation provisions applicable to the issuance of an enforcement order, such as a writ of execution or a garnishee summons, to enforce a judgment for the payment of money. The subject of the proper duration of such an enforcement order, once issued, will be considered in our project on *Remedies of Unsecured Creditors*.

3.27 We believe that two things are needed. (1) A limitation period should be imposed on the issuance of an order for the enforcement of a remedial order for the payment of money, and (2) a civil procedure should be available to a claimant for obtaining renewals of the limitation period under conditions which give adequate protection to the defendant. It is, however, much easier to state these requirements than it is to develop a procedural system for satisfying them which is direct, functional and reasonable. The requirements must be stated with more precision.

3.28 The claimant should be permitted to obtain an enforcement order, without judicial approval, for a fixed limitation period after the granting of a remedial order. We think that the ultimate limitation period of ten years which we have recommended is a reasonable period of time for this purpose.

3.29 In order to secure an enforcement order after the expiration of this limitation period, the claimant should be required to obtain judicial approval, *before* the expiration of the period, in an appropriate civil proceeding. In this civil proceeding the claimant should be required to prove the amount of the judgment debt remaining unpaid, and the defendant should be given an opportunity to contest this proof. It necessarily follows that the defendant must be given notice of the proceeding. We will recommend that the notice of motion procedure be used, as this particular civil proceeding will take place within the action which resulted in the remedial order which the claimant seeks to enforce. The defendant should not be permitted to contest the validity of the judgment, for the judgment will have become conclusive at the expiration of the appeal period applicable to it. In this civil proceeding the court will have to determine and declare the amount of the judgment debt remaining unpaid. If the declaration is that the debt has been satisfied, that will end the matter, except for routine administrative procedures required to clear the judgment from the judgment rolls. If the debt has not been paid in full, the court would authorize the issuance of an enforcement order during a further limitation period. But for conflict of laws problems, no new judgment would be required, for the original judgment would remain in force. It may be seen that the substantive judicial function of the court in this civil proceeding is to determine and to declare the amount of the unpaid judgment debt, if any; the claimant will be seeking a declaration of his remaining rights under the outstanding judgment.

3.30 In paragraphs 3.20-22 we recommended that the new Alberta Act not be applicable to claims for declaratory relief. One may ask, if that principle is sound, why does it not apply in this context? Here we propose a limitation period applicable to a claim for a declaration as to the unpaid balance of a judgment debt, and we do so to force any litigation on this issue to take place before the defendant's evidence has deteriorated unduly, or been discarded. If a claimant sought a declaration of the remaining rights and duties of the parties under a contract years after the contract was made, would not the defendant be equally vulnerable for evidentiary reasons? The answer is that the two situations differ fundamentally. A person would rarely claim a declaration of rights in a situation in which the defendant would have a limitations defence against any remedial order the claimant could secure to enforce those rights, even if they existed and had been violated by the defendant. The claimant would rarely gain anything but expense through the declaration, and the defendant would not be vulnerable to loss. Indeed, unless the claimant had a unique need for the bare declaration, we think that a court would dismiss the claim under its inherent power to control abuse of process. In the situation we are now considering the defendant will be vulnerable under a declaration that a judgment debt remains unsatisfied, for the claimant will already have an outstanding remedial order in the judgment hanging, like a sword, over the defendant's head.

3.31 At the present time there is a procedural scheme in force in Alberta for satisfying the two requirements we have discussed. It is provided by subsection 4(1) of the present Alberta Act, and by rules 331, 355 and 356 of the Alberta Rules of Court. However, while the existing scheme meets the two basic requirements in practice, it does so in a manner which is indirect, complex and unreasonably burdensome. We believe that we can recommend a system which is simple, rational and reasonable. But, in order to demonstrate that the system we will propose is better than the one we have, we must show why the existing scheme is defective, and that requires a brief explanation of how it evolved. Our explanation is taken from the judgments in two Court of Appeal cases: *Stubbs* v. *Allen*,[30] Saskatchewan, and *Thakar Singh* v. *Pram Singh*,[31] British Columbia.

3.32 Before the reign of Edward I, a rule developed that a personal judgment was so conclusively presumed to have been satisfied one year and a day after it was granted that no execution could thereafter be issued to enforce it. The judgment creditor's only recourse was to bring an action on the old judgment in order to obtain a new judgment under which execution could be issued. The Statute of Westminster[32] of 1285 provided an alternative procedure under a writ of *scire-facias*. Under this writ the judgment debtor was served, there were pleadings, and the judgment creditor was required to prove the amount outstanding on the original judgment. The court then made a declaratory judgment on this proof and authorized the issuance of execution on the new judgment. The *scire-facias* procedure was thus used to revive a judgment when no execution had been issued under it for one year and a day after it was granted. Although originally no time limitation applied to a *scire-facias* procedure, eventually the courts raised a second presumption of satisfaction which precluded this procedure 20 years after the original judgment was granted. It may be seen that the *scire-facias* procedure was an action on a judgment used to secure a new declaratory judgment of the unpaid balance on the old judgment in order to secure enforcement.

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[30] [1934] 2 W.W.R. 459.

[31] [1942] 1 W.W.R. 737.

3.33 The first statutory limitation provision applicable to an action on a judgment was contained in the Real Property Limitation Act[33] of 1833, and imposed a 20-year limitation period on such an action. Because, as a practical matter, the only actions on judgments were those brought to enforce judgments, it is these actions which were subject to the new limitation period. In effect, the new limitation provision codified the result achieved by the judicial presumption of satisfaction 20 years after a judgment was granted which had prevented a *scire-facias* procedure after that period expired.

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[32] 13 Edw. 1, stat. 1, c. 45.

[33] 3 & 4 Will. IV, c. 27, s. 40.

3.34 Significant changes in the procedures available to secure the enforcement of judgments were made in 1852 under the Common Law Procedure Act.[34] First, section 128 provided that execution on a judgment could be issued "without a Revival of the Judgment" for a period of six years from the recovery of the judgment. This provision thus overrode the judicial presumption of satisfaction by one year and a day after a judgment was granted and gave the judgment creditor six years to secure the issuance of execution. Second, the Act added two new procedures for reviving a judgment after the six-year period, and both required the service of notice on the judgment debtor. The first was called a procedure by suggestion and seems to have been designed for the case in which there was either no dispute or only one of law. If the judgment creditor proved an unpaid balance on the original judgment, a suggestion was entered on the judgment roll which authorized execution under that judgment. The second procedure required a writ of revivor, and was designed for the case in which factual issues were disputed. In substance, the procedure under a writ of revivor was the same as that under a writ of *scire-facias*, but somewhat simplified to reduce delay. Under the revivor procedure the court gave a declaratory judgment of the remaining judgment debt, and execution was authorized under this new judgment.

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[34] 15 & 16 Vict., c. 76, ss. 128-134.

3.35 The Real Property Limitation Act[35] of 1874 reduced the limitation period applicable to an action on a judgment from 20 to 12 years.

3.36 We will summarize the situation in England at this point. The judgment creditor could obtain the issuance of execution under his judgment, without prior judicial approval, for six years after the judgment was granted. If he failed to do so, the judgment had to be revived before execution could be issued, and it seems that four procedures were available to secure revival: (1) an action on the judgment, (2) a writ of *scire-facias* procedure, (3) a suggestion procedure, and (4) a writ of revivor procedure. Any one of these procedures had to be brought within the 12-year statutory limitation period. However, a revival of the judgment by any of these procedures renewed the operation of the limitation period for another 12 years.

3.37 The Statute Law Revision and Civil Procedure Act[36] of 1883 repealed all of the provisions of the Common Law Procedure Act of 1852 which we have discussed above, and substitute provisions were made under English rules 22 and 23 of Order 42. As rules 355 and 356 of the Alberta Rules of Court are, insofar as is relevant, the same as these English rules, we will focus on the current Alberta rules.

3.38 Section 128 of the Common Law Procedure Act of 1852, which gave the judgment creditor six years from the date of his judgment in which to secure execution without prior judicial approval, reappeared as English rule 22, and is the source of

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[35] 37 & 38 Vict., c. 57, s. 8.

[36] 46 & 47 Vict., c. 49.

Alberta rule 355, which provides:

> 355. As between the original parties to a judgment or order, execution may issue at any time within six years from the date of the judgment or order.

3.39 The remaining provisions of the Common Law Procedure Act of 1852, which permitted the revival of a judgment by the procedures of suggestion and writ of revival, were left to rest in peace. A new procedure was introduced by English rule 23. This English rule is the source of Alberta rule 356, which provides:

> 356. Where the six years have elapsed or any change has taken place by death or otherwise in the parties entitled or liable to execution, the party alleging himself to be entitled to execution may apply to the court for leave to issue execution accordingly or to amend any execution already issued, and the court may make an order to that effect or may order that any issue or question necessary to determine the rights of the parties be tried in any way in which a question in an action may be tried.

3.40 In *Stubbs* v. *Allen*[37] the Saskatchewan Court of Appeal held that a procedure under Saskatchewan K.B. rule 451, which is the Saskatchewan counterpart of Alberta rule 356, did not authorize an order which could either revive the original judgment or constitute a new judgment, and hence could not be used to renew the operation of the applicable statutory limitation period.[38] The court stressed two factors. (1) Unlike the procedures under *scire-facias* and those created by the Common Law Procedure Act of 1852, which required service on the judgment debtor, a procedure under K.B. rule 451 can be accomplished *ex parte*. (2) K.B. rule 451 contains no language purporting to authorize either revival or a new judgment. Rather, it merely permits the court to authorize execution on the original judgment. The court said that a judgment creditor who wishes to revive a judgment in order to gain a new limitation period should bring a timely action on the original judgment and obtain a new judgment.

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[37] *Stubbs v. Allen*, *supra* n. 30.

[38] *See Thakar Singh v. Pram Singh*, *supra* n. 31.

3.41 The applicable limitation periods in Alberta are contained in subsection 4(1) of the present Alberta Act.

> 4(1) The following actions shall be commenced within and not after the time respectively hereinafter mentioned:
>
> > (f) actions on a judgment or order for the payment of money, within 10 years after the cause of action thereon arose;
> >
> > (g) any other action not in this Act or any other Act specifically provided for, within 6 years after the cause of action therein arose.

Clauses 4(1)(f) and (g) quoted above refer, respectively, to "actions" and "action". Clause 1(a) of the present Alberta Act defines "action" as "a civil proceeding". Hence, pursuant to clause 4(1)(f), a civil proceeding under Alberta rule 356 to obtain the issuance of execution to enforce a judgment for the payment of money must be brought within 10 years after the judgment was granted, for the cause of action or civil proceeding is on the judgment. Moreover, we believe that, by identical reasoning, clause 4(1)(g), which is the catch-all provision in the Act, applies to a civil proceeding to enforce any other type of judgment, and here the limitation period is six years. Subsection 4(1) of the Act does not extinguish the rights and duties under a judgment after the expiration of the limitation period. However, its mandate that civil proceedings on a judgment must be commenced within the limitation period is not qualified. There is no escape provision such as "unless a judicial declaration of any unpaid balance of the judgment debt is made before the expiration of the limitation period". Subsection 4(1) of the Act thus leaves the rights and duties under a judgment unenforceable, and sterile, unless execution was issued before the expiration of the limitation period.

3.42 As a consequence, the only avenue open to a judgment creditor who wishes to keep his uncollected judgment alive is to bring a timely action on the old judgment and obtain a new judgment. The judgment creditor can either bring a common law action on the judgement, or he can utilize the procedure provided by Alberta rule 331, which provides:

> 331.(1) Where a judgment or any part thereof remains unsatisfied, a judgment creditor, at any time before proceedings under the judgment would be barred by *The Limitation of Actions Act*, may serve upon the judgment debtor a notice of motion requiring him to appear before a judge in chambers and show cause why the judgment creditor should not have a new judgment for the amount remaining due and unpaid on the original judgment and the proceeding shall be deemed an action on a judgment or order of the court.
>
> (2) Rule 548 does not apply to subrule (1).
>
> (3) The notice of motion shall issue in the original cause or matter and shall be served upon the judgment debtor in the same manner as a statement of claim at least 15 days before its return date.
>
> (4) If, upon the return of the motion, the judgment debtor does not appear and the court is satisfied
>
> (a) as to service of the notice of motion, and
>
> (b) as to the amount still due and unpaid under the original judgment
>
> the court may order that the judgment creditor have leave to enter a new judgment for the amount so due and costs, if in the discretion of the court costs are

allowed.

> (5) If the judgment debtor appears and disputes the judgment creditor's claim in whole or in part, the court may give directions for the trial of an issue with or without pleadings as the circumstances of the case require, and give all necessary directions.

3.43 We have traced the history of the limitation provisions applicable to judgments in order to show how the present Alberta scheme evolved. In our view that scheme consists of two packages. One is comprised of clauses 4(1)(f) and (g) of the present Alberta Act and Alberta rule 331. The other is comprised of Alberta rules 355 and 356. The two packages seem to have developed almost independently of each other. It is as though two groups of designers were let loose, each developed a set of proposals for a limitations system for judgments, and both sets of proposals were enacted to form an illogical and cumbersome scheme.

3.44 We find no logic in the package comprised of clauses 4(1)(f) and (g) of the present Alberta Act and Alberta rule 331. In effect, if not in theory, clauses 4(1)(f) and (g) extinguish a judgment at the expiration of the applicable limitation period. That this overkill is not really intended is made apparent by rule 331, which provides a procedure which, if utilized in time, will result in a new judgment to replace the one about to be extinguished. If the object of the exercise is to require the judgment creditor to prove the balance of his judgment rights at some point in time after the judgment was granted as a prerequisite to the issuance of an enforcement order, we believe that the system should impose this requirement in a straightforward manner. We have already recommended that the new

Alberta Act should not be applicable to a claim requesting the enforcement of a judgment, and we need not repeat this recommendation. This means that the new Act should not contain provisions analogous to clauses 4(1)(f) and (g). By its explicit terms, rule 331 applies only to the situation when the judgment creditor needs a new judgment because proceedings under his old judgment will be barred by the present Alberta Act. As there will be no provisions barring enforcement of a judgment in the new Act, rule 331 should be eliminated.

3.45 We believe that the present Alberta limitations scheme applicable to judgments imposes burdens on judgment creditors far in excess of those required to satisfy reasonable limitations objectives. The creditor will first have gone to the trouble and expense of converting an uncollected simple contract debt into a judgment debt. This judgment will consist of a court declaration of the creditor's rights and a court order directing the debtor to perform his duties. Under Alberta rule 355 the judgment creditor is given six years from the judgment date to secure execution without judicial approval. But if he requires the issuance of execution after this period, he must apply to the court for leave under rule 356.

3.46 Although Alberta rule 356, like its source English rule 23, establishes a procedure for securing the issuance of execution under a judgment which differs significantly from the procedures created by the Common Law Procedure Act of 1852, rule 356 nevertheless carries an imprint of the 1852 Act. Recall that under the 1852 Act the judgment debtor had to be served, but thereafter two procedures were available: suggestion and revivor. The suggestion procedure was designed for the case in which no factual issue was disputed and no trial was required. If a trial were required the judgment creditor was required to proceed under a writ of revivor. Under rule 356 the judgment creditor can apply for leave to enter execution *ex parte*, and it appears that the court can authorize this without further ado unless it perceives problems. If it does perceive problems the court can order that any necessary question or issue be tried as in an action, and this of course assumes notice to the judgment debtor. The important point is that, if the judgment creditor seeks the issuance of execution in the seventh year after his judgment, when the evidence of any unpaid balance would still be relatively fresh, he must nevertheless seek court approval. Even if leave is issued *ex parte*, the judgment creditor will have incurred the trouble and expense of a court proceeding. Moreover, as an order for leave to issue execution under rule 356 does not produce a new judgment, it will not renew the operation of a limitation period. Assume that the judgment was for the payment of money. If the judgment still cannot be satisfied under the execution into the ninth year after the judgment, the judgment creditor will have to bring an action on the judgment, following either common law procedure or that provided by Alberta rule 331, and obtain a new judgment to avoid the bar which will be imposed by clause 4(1)(f) of the present Alberta Act. The process must then be repeated unless the judgment creditor decides to quit sending good money after bad. With a new judgment he will have six years under rule 355 to obtain execution. If unsuccessful he must come back to court in the seventh year under rule 356, and come back again in the ninth year to obtain a newer judgment. We do not think that limitations objectives demand that a judgment creditor carry this heavy a yoke.

3.47 We think that Alberta rule 355 should be amended to provide a limitations system applicable to the issuance of enforcement orders with respect to judgments for the payment of money. We do not think that limitation provisions are required with respect to the enforcement of any other remedial order. The judgment creditor should be given ten years to obtain the issuance of execution after the date of his judgment without court approval. If he wishes to obtain an enforcement order after this period, he should be required to obtain judicial approval before the expiration of this period. The order granting this approval should be operative for a further period of ten years from the date of the new order. If we were concerned only with enforcement in Alberta, we would recommend that the new rule 355 procedure be called a procedure to revalidate a judgment. However, other jurisdictions will retain limitation provisions applicable to actions on judgments with barring consequences. To meet this conflict of laws problem we will recommend that the court be authorized to issue a new judgment under the new rule 355 procedure.

3.48 At the present time a judgment creditor may bring an action on an Alberta judgment and obtain a new judgment under either of two procedures. He may use what we have described as "common law" procedure, or he may use the procedure provided by Alberta rule 331. We see no need for two different procedures to obtain the same result, and we believe that the common law action should be abolished. We believe that the new procedure provided by an amended Alberta rule 355 should be largely based on rule 331. However, Professor Dunlop suggests that the rule 331 process has been interpreted so restrictively that a lawyer might be safer to use the common law action on a judgment.[39] For this reason we specifically invite comments as to the content of an amended rule 355 procedure based on the present rule 331 procedure.

3.49 Alberta rule 356 is now applicable in two distinct situations. (1) It must be used by the judgment creditor to obtain leave to issue execution "where the six years have elapsed" under Alberta rule 355. (2) It must also be used when "any change has taken place by death or otherwise in the parties entitled or liable to execution" which would make it necessary "to amend any execution already issued". We think that rule 356 should be amended by the deletion of the language which makes it applicable in the first situation, for the new rule 355 procedure will cover this situation. Rule 356 will then apply only in the second situation.

3.50 We have now discussed two situations in which a judgment creditor would bring a proceeding on a judgment. (1) He would do so to secure leave to issue execution under Alberta rule 356, and (2) he would do so to obtain a new judgment in order to avoid the barring effect of subsection 4(1) of the present Alberta Act. There is a third situation: (3) an action on a foreign judgment.[40] An action on a foreign judgment in Alberta is treated as an action on a simple contract debt. As such, it will be subject to the new Alberta Act. The Alberta judgment issued pursuant to such an action will be subject to the enforcement provisions of the new Alberta rule 355. A foreign judgment registered in Alberta under the Reciprocal Enforcement of Judgments Act[41] will be treated as an Alberta judgment from the date of registration, and will then be subject to the enforcement provisions of the new Alberta rule 355.

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[39] C.R.B. Dunlop, *Creditor - Debtor Law in Canada* (1981) 369.

[40] In its *Report on Limitation of Actions*, (1969) 47-48, (hereafter the "Ontario Report"), the Ontario Law Reform

3.51 We will mention a nettlesome problem which exists under the present Alberta limitations scheme applicable to judgments. Subsection 4(1) of the present Alberta Act imposes a limitation period on an action on a judgment which begins when the cause of action accrued. When a judgment orders the payment of principal money, and already accrued interest and taxable costs, the cause of action on this debt accrues when the judgment was issued. However, further interest and taxable costs may accrue subsequently, and may not be barred when the original judgment debt is barred. Our recommendation will avoid this problem because it will not impose a limitation period which begins when a claim accrued. Rather, it will preclude the issuance of an enforcement order for any rights under a judgment after the expiration of the limitation period.

Recommendation 12

We recommend that rule 331 of the Alberta Rules of Court be deleted.

Recommendation 13

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[40] (cont'd) Commission also concluded that these are the three situations in which one would bring an action on a judgment.

[41] R.S.A. 1980, c. R-6.

We recommend that rule 355 of the Alberta Rules of Court be amended to provide that:

(a) Subject to rule 356, an enforcement order may be issued, without leave of the court, at any time within ten years from the date of a judgment or order for the payment of money.

(b) No enforcement order may be issued to enforce any rights under a judgment or order for the payment of money after the expiration of the period specified in subrule (a) unless, before the expiration of this period, the judgment creditor obtains a judgment or order under subrule (c).

(c) The court may [in a proceeding in substance as provided by rule 331] make an order revalidating a judgment or order originally granted, or grant a new judgment or order.

(d) A judgment or order for the payment of money made under subrule (c) is governed by subrules (a) and (b).

(e) The common law action on a judgment is abolished.

Recommendation 14

We recommend that rule 356 of the Alberta Rules of Court be amended by the deletion of language requiring a judgment creditor to request leave to issue execution because of the lapse of time after the date of a judgment or order.

C. Remedial Claims Excluded

3.52 There are several categories of claims which we believe should be excluded from the application of the new Alberta Act, even if they do request a remedial order. We will now discuss these categories of claims.

(1) Judicial review of administrative proceedings

3.53 We do not believe that the new Alberta Act should be applicable to a claim requesting judicial review with respect to the exercise of statutory powers. The last half century has witnessed a burgeoning of administrative authorities exercising ministerial and quasi-judicial statutory powers on behalf of government departments, agencies, boards and tribunals. With this proliferation of administrative actions the number of claims which aggrieved persons have brought requesting judicial review of the exercise of statutory powers has increased dramatically. In Alberta and in most common law jurisdictions there are two categories of so-called remedies which a claimant may invoke to obtain judicial review with respect to the exercise of statutory powers.

3.54 The first category, called prerogative remedies, includes four remedies adapted from the ancient writs of certiorari, prohibition, mandamus and quo warranto. Although the word "writ" is no longer used, these remedies retain the same names and authorize courts to make the same orders as did the old writs. These remedies are available only for the review of actions of an inferior authority by a superior authority. (1) Certiorari is the remedy usually used today to obtain judicial review. Literally translated, it means that the record of the inferior authority is "certified" and transmitted to the superior reviewing authority. The reviewing court is authorized to quash, that is, to set aside an illegal action of an authority. (2) Prohibition is a preventative rather than a curative remedy. Under this remedy the reviewing court is authorized to order an authority to refrain from beginning or continuing a proceeding which will result in an illegal action. (3) Mandamus is a performance-type remedy and literally means "we command". The reviewing court is authorized to order an authority to exercise a statutory power when the authority has a nondiscretionary statutory duty to do so. (4) Quo warranto is so little used that it is not commented upon here.

3.55 The second category, called nonprerogative remedies, includes two remedies: declarations and injunctions. These remedies are of much more recent origin than the prerogative remedies. Unlike the latter, these remedies are used primarily in civil judicial proceedings between private persons, and have been adapted for use by private persons to obtain judicial review of the exercise of statutory powers by authorities. (1) Declarations, as we have already pointed out, are not true judicial remedies at all. Nevertheless, they are being used to secure judicial review with increasing frequency, for they authorize a reviewing court to issue a declaration as to the legal relations between the authority exercising a power and the person under a liability to have his rights and duties altered if the power is exercised. Thus a reviewing court can declare that an action of an authority was illegal either because the authority lacked the power to take it or abused the power which it had. A declaration is less effective than the true remedy offered under certiorari because a declaration has no curative effect; it does not set aside an action of an authority and hence render it invalid. However, the action left valid is not a serious problem in practice because an authority will seldom seek to enforce an action which a court has declared was illegally taken. (2) Injunctions have now largely replaced the prohibition remedy in practice. An injunction is a preventative remedy; a reviewing court can order an authority to refrain from commencing or continuing a proceeding in order to prevent the accrual of third party rights.

3.56 A court's power to review the actions of a nonjudicial authority is significantly narrower than its power over an inferior court. When a superior court reviews an action of an inferior court it can, of course, determine whether or not that court had the power to take the action and whether or not the procedures it used resulted in an abuse of that power. But it can also review the findings of fact of the inferior court and the law which it applied, and hence can review the merits of the action taken. Moreover, it can remand a case to an inferior court with directions and it can issue remedial orders against any defendant under a claim. A court cannot review the actions of a nonjudicial authority on the merits; it can determine only whether or not those actions were legal. Those actions would be legal if they were within the statutory powers, that is, the jurisdiction of the authority, and if they did not result from an abuse of power, that is, if the authority followed procedures which were fair under the circumstances. When used for judicial review of the exercise of statutory powers, none of the so-called remedies under consideration authorizes the issuance of a remedial order to enforce a right-duty relationship. Rather, their purpose is to test the legality of the exercise cf statutory powers, and hence to determine whether or not the rights and duties of a person with a liability under a power were affected by its exercise. In substance, therefore, the so-called remedies used in judicial review of the exercise of statutory powers are declaratory in effect rather than remedial. This is one reason why we think that the new Alberta Act should exclude claims requesting judicial review with respect to the exercise of statutory powers.

3.57 There is, however, a more practical reason why the new Alberta Act should not apply to claims requesting judicial review of the exercise of statutory powers. Functionally, these claims are akin to appeals; they just happen to be "appeals" from the actions of nonjudicial authorities rather than those of inferior courts. Limitations on the time available for a party to bring an appeal from the actions of an inferior court are contained in the Rules of Court. Rule 742 imposes a six-month limitation period on an application for certiorari. Because actions under statutory powers frequently affect large segments of the public and result in the creation of new right-duty relationships between many persons, it is probable that claims for judicial review to test the legality of the exercise of statutory powers should be brought relatively quickly after the actions were taken.

3.58 We think that, although there probably should be a limitations system applicable to claims requesting judicial review of the exercise of statutory powers, the value judgments which must be made in developing that system, like those which are involved in selecting limitation periods for appeals from the actions of inferior courts, are significantly different from the value judgments which a limitations statute reflects in connection with claims for remedial orders to enforce right-duty relationships. Consequently, in our view a limitations system for claims requesting judicial review of the exercise of statutory powers should be contained in either the Rules of Court or a specialized statute devoted to judicial review.

3.59 Under our recommendation, claims requesting judicial review with respect to the exercise of "statutory powers" will be excluded from the coverage of the new Alberta Act. As we do not propose that "statutory powers" be defined in the Act, there may be a marginal uncertainty as to the kinds of nonjudicial authorities which exercise statutory powers, and indeed the kinds of actions which are taken under statutory powers.

3.60 One solution we might have recommened would be to add, after the words "statutory powers", "through the remedies of certiorari, prohibition, mandamus, quo warranto, declaration and injunction, and under any enactment expressly providing for judicial review of the exercise of statutory powers". Because the prerogative remedies are only used for judicial review of the actions of inferior authorities, the law of those remedies would define the actions taken under statutory powers and the authorities which take them. This solution has been rejected for two reasons. (1) Declarations and injunctions are used far more extensively than for judicial review, and hence the law of these remedies would define neither the actions taken under statutory powers nor the authorities which take them. (2) Many jurisdictions have enacted statutes modernizing the procedures for obtaining judicial review of the exercise of statutory powers, and the substantive law governing the kinds of orders courts can make under judicial review. Usually the existing remedies are replaced by one new comprehensive remedy. Alberta may well follow this course, and if it does, a statute drafted in terms of existing remedies would become obsolete.

3.61 A second solution we might have recommended would be to add, after the words "statutory powers", the word "by" followed by a generic list of the kinds of authorities which exercise statutory powers within the ambit of the intended exclusion. The problem is that such a generic list might draw in authorities which should be excluded, and omit ones which should be included. Hence it is our conclusion that the words "statutory powers" will identify the authorities and their actions without ambiguity in the overwhelming majority of cases, and that cases in the gray area are best left to the courts to be resolved in accordance with the purpose of the exclusion.

Recommendation 15

> We recommend that the new Alberta Act provide that: this Act is not applicable to a claim requesting judicial review with respect to the exercise of statutory powers.

(2) Habeas corpus

3.62 We do not believe that the new Alberta Act should be applicable to a claim requesting habeas corpus. Section 11 of the Constitution Act, 1982 provides that "everyone has the right on arrest or detention . . . to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful". Section 11 thus expresses one of the most fundamental right-duty relationships recognized by law: the right of every person to liberty and the duty of all other persons to respect that right. A claim requesting habeas corpus would almost inevitably request a remedial order, for it would request the court to order a person unlawfully detaining another to comply with the duty to release him. In most cases a government authority will be responsible for a detention, the claim will request judicial review of the validity of the exercise of statutory powers by the authority, and hence a claim for habeas corpus will usually be excluded from the coverage of the Act for that reason. But there are unlawful detention cases where no government authority is involved, frequently in the context of child custody disputes. Because it would be utterly offensive to impose a limitation provision on a claim for habeas corpus, we prefer a specific exclusion provision for all claims for habeas corpus.

Recommendation 16

We recommend that the new Alberta Act provide that: this Act is not applicable to a claim requesting habeas corpus.

(3) Property claims

3.63 We do not believe that the new Alberta Act should be applicable to claims requesting remedial orders within five categories, all of which are related to property interests. When a defendant obtains immunity from liability under a claim, the court can no longer exercise its power to issue a remedial order enforcing the specific right-duty relationship upon which the claim was based. As a consequence, rights will frequently be rendered sterile by a limitations act. In Chapter 9 we will consider whether rights which have become unenforceable under the Act should also be extinguished by it.

3.64 However, although rights will frequently be left unenforceable as a consequence of a limitations act, more frequently that will not be the result, and it is not the purpose of such an act. If C is tortiously assaulted by D, and if C fails to bring a claim requesting damages within the prescribed limitation period, D may obtain immunity from liability under that claim. If so, the court will lack the power to issue a remedial order giving C a right to damages and imposing a duty on D to pay them. But C's continuing right not to be assaulted by D or anyone else will continue unaffected. If C and D have made a contract which requires D to perform a series of duties over a period of time, if D breaches a duty, and if C fails to bring a timely claim requesting a remedial order based on the breach of that duty, D may obtain immunity from liability under that claim. If so, the court will lack power to issue a remedial order requiring D either to perform that duty or to pay damages for its breach. C will have lost one of his contract rights, but the remainder of those rights will continue unaffected. If C is the owner of land, if D trespasses upon that land for several months and cuts and removes timber, and if C fails to bring a timely claim requesting a remedial order based on D's breach of duty, D may obtain immunity from liability under that claim. If so, the court will lack the power to issue a remedial order giving C a right either to damages or to the profits from the sale of the timber. But C's continuing rights as the owner of the land will remain unaffected. In short, a limitations act should render rights unenforceable, or prevent their acquisition under a remedial order, only to the extent necessary to achieve the goals of a limitations system. However, a limitations system is only part of the broader judicial system which exists to protect rights and to enforce duties; hence the goals of a limitations system conflict with other goals of the judicial system. The recommendations we will shortly make all reflect policy conclusions that the benefits derived from enforcing the property interests described below will exceed the benefits which would be gained by applying a limitations system to the claims requesting remedial orders.

(a) Possession of property

3.65 We believe that the new Alberta Act should not apply to a claim requesting a remedial order for the possession of real or personal property. Only two methods are used to define this category of excluded claims: (1) the type of remedial order claimed, an order for possession, and (2) the subject matter affected by the order, real or personal property. There must, of course, be a property interest conferring a right of possession, but the right itself may be either legal or equitable. The subject matter affected by the remedial order is described as "property". Technically, property is a legal concept and denotes a cluster of rights and duties of persons related to land or something else. Property is neither land nor a thing. However, in commonly accepted parlance, "property" is also used to mean the land or thing in which property rights exist, and our recommendation will adopt this usage.

3.66 Ownership is the largest cluster of rights and duties related to land or a thing, and hence is the largest property interest. And, the most important ownership right is the right of possession, for with this right an owner can either use land or an automobile himself, or he can lease either and enjoy the income. If an owner is permanently deprived of the right of possession of his property, his ownership will usually become a hollow legal formality. Under the present Alberta Act, if an owner of land or a thing permits another to adversely possess it longer than the prescribed limitation period, the owner can no longer obtain a remedial order to obtain possession. In our opinion this doctrine should be abolished.

(i) Land

3.67 When applied to land this doctrine is frequently called "adverse possession". If C were the owner of land, if D, or a predecessor whose possessory rights D acquired, took possession of the land adversely to C or his predecessor owners and continued that adverse possession for the prescribed limitation period, under the present Alberta Act, C would have lost both his right to obtain possession of the land and his ownership of it. This doctrine can serve four objectives in some jurisdictions.

3.68 First, the doctrine assists in creating marketable title to land. If D and his predecessors have been in possession of land adversely to a possible true owner, such as C, for the prescribed limitation period and a further period long enough to give reasonable protection against the possibility that C or a predecesor might have been under a disability, the odds will be so high that C's ownership, if it existed, was extinguished under the limitations statute that D will have a marketable title under commercial and legal standards. There rarely is a C, and the doctrine of adverse possession was not designed to protect D from stale claims. The doctrine of adverse possession extinguishes the true ownership of a remotely possible C as the price to be paid to give D, who most likely is the true owner, a marketable title. This result facilitates the transfer of interests in land. In Alberta marketable titles are created under the Land Titles Act,[42] and the doctrine of adverse possession is not required to achieve this objective.

3.69 Secondly, the doctrine promotes the productive use of land. During the nineteenth century, when much of Canada was settled, having land occupied and brought into production was a public policy objective. If C were an absentee owner of land, and if D took adverse possession of the land for the prescribed period, whether in the mistaken belief that it was his or with the knowledge that it was not, D usually made the land productive. The doctrine of adverse possession rewarded D with ownership of the land for his efforts, albeit at the expense of C. It is our conclusion that, as most productive land in Alberta is now in use, the doctrine of adverse possession is no longer an acceptable method for encouraging this objective.

3.70 Thirdly, the doctrine may aid in satisfying the expectations of purchasers. Purchasers of land frequently fail to identify the precise boundaries of the land in terms of the legal description of the land and the survey markers upon which it is based. Rather, they rely on what is occupied by their sellers and is identified by such visible boundary markers as fences, hedges, roads and sidewalks. If one of these visible markers is on a neighbour's land, the purchaser will think that he has purchased more land than he in fact has, unless his expectations turn out to be satisfied because of the doctrine of adverse possession. Occasionally a purchaser will purchase one lot in a subdivision and by mistake will think that he has purchased an adjacent lot and will occupy that lot. When this happens the purchaser may gain ownership of the mistakenly occupied lot under adverse possession, and unless someone else gains ownership of his purchased lot under the doctrine, he may end up owning two lots. Whether the case be one of mistake of boundary or mistake as to an entire parcel, both the owner of the land and the adverse possessor will have been careless. It is our conclusion that satisfying the expectations of a purchaser does not justify extinguishing land ownership under the doctrine of adverse possession.

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[42] R.S.A. 1980, c. L-5.

3.71 Fourthly, the doctrine may help in preventing unjust enrichment. A person in adverse possession of land may make lasting improvements on the land in the mistaken belief that the land is his own. If the adverse possessor gains ownership, the former owner will not be unjustly enriched at the expense of the adverse possessor. Query, however, if the doctrine of adverse possession does not unjustly enrich the adverse possessor at the expense of the former owner. Under section 60 of the Law of Property Act,[43] a person who has made lasting improvements on land of another in this situation is either entitled to a lien on the land for the value of the improvements or is entitled to purchase the land. In our opinion this provision adequately solves the unjust enrichment problem.

(ii) Personal property

3.72 Limitation provisions were first applied to claims for possession of personal property when few persons were literate and when there was seldom written evidence proving the ownership of the property. One in possession of personal property was the presumed owner of the property, and one who sought to recover possession of the property would almost invariably have to prove his ownership with oral testimony. As the claimant had to prove his ownership during the limitation period, the memories of witnesses, and hence the relevant evidence, would be relatively fresh. A limitation period thus avoided litigation based on stale oral testimony and gave good title to one who held possession for the prescribed period. Unfortunately, a thief, or one who purchased property from him or from a 'fence', would usually be the primary beneficiary of the limitation provision.

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[43] R.S.A. 1980, c. L-8.

3.73 Although no titles are issued for personal property in Alberta, as is the case for interests in land, written evidence of the ownership of most valuable items of personal property is generally available. The merchant who first sells a painting, a rug, a fur coat, a piece of jewelry or a horse will almost always issue a bill of sale. Manufactured items, such as appliances, bicycles, and motor vehicles usually have serial numbers. There is a registration system for motor vehicles. Subsequent sales of valuable items are frequently made under bills of sale. Ownership of personal property based on transmissions at death can usually be established by court documents. One in possession of personal property is still the presumed owner; in order to prevail, a claimant seeking possession has the burden of proving his right to possession. It is our conclusion that an owner in possession of personal property will rarely lose possession to a fraudulent claimant, but that a limitation provision applicable to claims for possession will often shift ownership to a rogue or one who has acquired possession through him.

Recommendation 17

We recommend that the new Alberta Act provide that: this Act is not applicable to a claim requesting a remedial order for the possession of real or personal property.

(b) Realization of security interest

3.74 We do not believe that the new Alberta Act should apply to a claim requesting a remedial order for the realization of a security interest by a secured party in rightful possession of the collateral. "Security interest" may be defined as an interest in collateral that secures the payment or other performance of an obligation, and "collateral" may be defined as property that is subject to a security interest. If C and D made an agreement which imposed an obligation on D in favor of C, such as a duty to pay C money, C could rely on D's personal obligation. If so, C would be an unsecured creditor of D. If D failed to make a payment when due, C could bring a claim requesting a remedial order, which in this situation would be a personal judgment requiring D to pay the debt. However, when C and D made the agreement, C might have insisted that D give C a security interest in some property of D. This property is then called the "collateral" because it serves as collateral or auxiliary security for D's personal obligation; C would be a secured creditor of D. If D failed to make a payment when due, C could bring a claim requesting a remedial order for the realization of his security interest. The civil proceeding would usually be a mortgage foreclosure, and the remedial order would usually direct the sale of the collateral. C would be given a right to payment of the debt owed to him from the sale proceeds, and D would be given a right to the remainder of the proceeds.

3.75 Usually the debtor (D) will hold rightful possession of the collateral, and will not know if, when or how the creditor (C) will attempt to enfore his right to payment of the debt. In this situation the objectives of a limitations system require C to show his hand and commence a civil proceeding by bringing a timely claim. Whether the claim requested a personal judgment against the debtor or realization of the security interest, it would request a remedial order and should be subject to limitation provisions. However, occasionally C will hold rightful possession of the collateral. The security agreement may have given C a right of possession, either when it was originally made or upon D's default, and C may have obtained rightful possession under the agreement. In a recessionary period the value of the collateral may have fallen below the amount of the debt. Knowing that the proceeds of a sale upon realization of the collateral will leave no surplus for him, D may have simply given C rightful possession of the collateral to simplify matters and to save costs.

3.76 There are two policy reasons for the exclusion from a limitations system of claims of the type under consideration. One is that, by taking rightful possession of the collateral, the creditor has taken a positive step to enforce his rights which substantially satisfies the objectives of a limitations system. Consequently, his claim for a remedial order for the realization of his security interest need not be subjected to limitation provisions.

3.77 The second reason is the need to solve a practical problem fairly. It is a technical, but important problem. An owner will frequently sell property under an agreement for sale which requires the purchaser to pay the purchase price in a series of installments, often over a period of years, and which does not require the seller to transfer title until the purchase price is paid. The seller (C) is a creditor, the purchaser (D) is a debtor, the property is the collateral, and the title to the collateral retained by C is a security interest. After making a few payments, D will sometimes default and either abandon the property or deliver possession to C. If so, C might promptly bring a claim requesting a remedial order for the realization of his security interest. With title to and possession of the property, more likely C would not do this. Assume that, after the limitation period had run against any claim C could bring requesting a remedial order, D brought claims requesting (1) a declaration that, as D was entitled to immunity from liability under any claim C could bring requesting a remedial order for the realization of his security interest, the security interest was discharged, (2) a declaration that D was the owner of the property, and (3) a remedial order for possession of his property! C would have no limitations defence to any of these claims. As D would obtain the property for far below the purchase price if he prevailed, it is highly unlikely that the court would want to grant D's requests. C could bring a claim requesting a declaration that D had forfeited his rights under the agreement for sale, and the court would probably grant this declaration. The declaration would legalize and preserve C's position under the agreement; as C could retain the payments already received by him and would already have title to and possession of the property, C would not need a remedial order.

However, depending on the circumstances, and in particular the loss which D would sustain under a forfeiture, the court might wish to give D a right to redeem his property by curing his defaults under the agreement in order to avoid a forfeiture. How could the court do this if D were immune from liability under any claim C could bring requesting a remedial order requiring D to comply with his duties under the agreement? That is, how could the court give D a right to pay late if D were entitled to an immunity from liability to any court order requiring him to pay at all? Perhaps the court could give D an option; either forgo the limitations defence to C's claims as the price for the right to redeem, or suffer a forfeiture. Because D commenced the civil proceedings, and because C's claims would be related to D's initial claims in the proceedings, perhaps D would not be immune from liability under C's claims under the provisions we will discuss in Chapter 5 of this report. If the Act does not apply to C's claim for the realization of his security interest when he has rightful possession of the collateral, this entire problem is avoided.

> Recommendation 18
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> We recommend that the new Alberta Act provide that: this Act is not applicable to a claim requesting a remedial order for the realization of a security interest by a secured party in rightful possession of the collateral.

(c) Redemption of collateral

3.78 We do not believe that the new Alberta Act should apply to a claim requesting a remedial order for the redemption of collateral by a debtor. Our reason is that we want to insure that a debtor can claim a right to redeem his collateral so long as the secured party can bring a timely claim for the realization of his security interest, and until any remedial order granted in response to such a claim is final.

3.79 A secured party's claim to realize his security interest will accrue at the time the debtor defaults on his obligations, and the ultimate limitation period will begin against the claim to realize at this time. Moreover, the secured party will suffer injury in the form of economic loss at the time of default, he will most likely acquire the requisite knowledge as to his claim at this time, and if so, the discovery limitation period will also begin against the claim. A security agreement will almost never give a debtor a right to redeem collateral by paying a debt in default. Consequently, when a court grants a debtor a right to redeem collateral, the court will almost certainly be making a remedial order, for it will be exercising a judicial power to vary the terms of the security agreement. The debtor's claim for a right to redeem his collateral will accrue at the time of his default. Unless the debtor obtains a right to redeem his collateral, he may suffer injury because of the economic loss he may sustain through a forfeiture under the security agreement. The debtor will most likely acquire the requisite knowledge as to his claim to redeem at the time of his default. If the new Alberta Act were to apply to a claim for a right to redeem collateral, the ultimate period would begin against the claim at the time of the debtor's default, and the discovery period would probably also begin at this time.

3.80 What will be the practical consequences if the new Alberta Act does not apply to a claim for a right to redeem collateral, and if such a claim will not, therefore, be vulnerable to a limitations defence? The Act will usually apply to a claim by a secured party to realize his security interest, and if the secured party does not bring such a claim within the applicable limitation period, the debtor will be entitled to assert a limitations defence to the claim. In this situation the debtor will no longer require a right to redeem his collateral, and any limitations defence the secured party would have against a claim to redeem would be irrelevant. The debtor will need a declaration that the security interest is discharged, he may need a declaration that he is the owner of the collateral, and he may need a remedial order for possession of the collateral. No limitation provision will apply to any of these claims under our recommendations.

3.81 The debtor will need a right to redeem his collateral as long as the secured party can bring a timely claim to realize his security interest, and until any remedial order granted in response to a timely claim to realize is final. A limitations defence to a claim to redeem, if available, would be relevant in two situations. A secured party might bring a timely claim to realize (1) just before the expiration of the limitation period applicable to both claims, leaving the debtor inadequate time to counterclaim for a right to redeem, or (2) after the limitation period applicable to a claim to redeem had expired, in a situation in which the secured party was in rightful possession of the collateral and not vulnerable to a limitations defence at all. One of the primary objectives of a claim to realize a security interest is to obtain a court order which, when final, will foreclose the debtor from obtaining any future right to redeem. When the remedial orders based on a claim to realize a security interest, and which will foreclose any right to redeem, are final is an issue to be determined under the substantive law applicable to security interests. The courts have jealously guarded their power to grant a debtor a right to redeem collateral when permitted under substantive mortgage law, and we do not believe that limitations law should upset the relationship between the secured party's right to realize his security interest and the debtor's right to redeem his collateral.

3.82 It is probable that, even if the new Alberta Act did apply to a claim for a right to redeem collateral, the debtor would always be able to overcome the limitations defence under the provisions we will recommend in Chapter 5 of this report. We believe, however, that excluding claims for a right to redeem collateral from the coverage of the new Alberta Act is a more efficient solution.

> Recommendation 19
>
> We recommend that the new Alberta Act provide that: this Act is not applicable to a claim requesting a remedial order for the redemption of collateral by a debtor.

(d) Nonpossessary interests

3.83 We do not believe that the new Alberta Act should apply to a claim requesting a remedial order requiring a defendant to comply with a duty based on an easement, a *profit a prendre*, a utility interest or a restrictive covenant. Two methods are used to define the category of excluded claims. (1) The first method is the type of remedial order requested; it must be one requiring a defendant to comply with a duty. Hence a claim requesting a remedial order requiring a defendant to pay damages for the violation of a right would not be excluded. (2) The second method is the type of right-duty relationship upon which the claim is based. The right-duty relationship to be enforced must be based on one of the listed property interests. The subject matter affected by the order is an implicit method of definition, for the property interests are only recognized in land.

3.84 We do not think that the listed property interests should be rendered unenforceable, and hence extinguished for all practical purposes, by the operation of a limitations act. For this reason, only claims for performance based remedies would be excluded. Thus, no limitation provision would apply to a claim for a remedial order requiring a defendant to comply with a duty: to refrain from blocking the access to land subject to an easement, a *profit a prendre*, or a utility interest; or to refrain from using property in violation of a restrictive covenant.

Recommendation 20

> We recommend that the new Alberta Act provide that: this Act is not applicable to a claim requesting a remedial order requiring a defendant to comply with a duty based on an easement, a *profit a prendre*, a utility interest, or a restrictive covenant.

(e) Land Titles Act registers

3.85 We do not believe that the new Alberta Act should apply to a claim requesting a remedial order for the revision of a register under the Land Titles Act.[44] The word "register" is defined in clause 1(u) of the Land Titles Act as "the register of titles to land kept in accordance with this Act". As the Registrar is responsible for the maintenance of the registers in accordance with law, any claim under this exclusion would request judicial review of some act or omission of the Registrar. Because all of the Registrar's actions are taken in the exercise of statutory powers, these claims will be excluded from the coverage of the Act by the exclusion for claims for judicial review of the exercise of statutory powers. However, because of the importance of this issue, we think that a specific exclusion provision should be included in the Act to avoid any possible ambiguity.

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[44] R.S.A. 1980, c. L-5.

3.86 The exclusion under consideration is required because the Land Titles Act establishes a Torrens system for conveyancing in Alberta. The English common law authorizes a system of private conveyancing; legal interests in land are created, altered and terminated by private acts of the parties to a transaction, and no limitation provisions are applicable to this conveyancing system. Under the Torrens system the parties must instruct the Registrar as to the intended transaction, and the Registrar executes the transaction by means of entries on a register kept under the Act. Thus the Registrar maintains the registers by a continuous process of revisions to create, alter and terminate legal interests in land, and no limitation provisions are applicable to this public conveyancing system. Most revisions to the registers are made by the Registrar under his statutory powers without intervention by the courts. When the system operates properly, the Registrar will refuse to make a requested revision only when he believes that the propriety of the revision depends on a disputed issue of fact or law. In such a situation either he will request judicial instructions or one of the interested parties will bring a claim requesting a judicial remedial order directing the Registrar to make a revision. A judicial order directing the Registrar to make a revision will be a remedial order because it will direct the Registrar, albeit as a nominal defendant, to perform a duty. However, in the final analysis, the ultimate revisions to the registers under the Torrens system will usually simply execute transactions which the parties would have executed under the common law system of private conveyancing. Any transaction the parties could execute under the common law without constriction by limitation provisions the Registrar should be able to execute under the Torrens system free of limitation provisions, whether he acts under his own discretion or under a judicial order.

3.87 The operation of the exclusion we propose can be demonstrated by a series of simple examples. In these examples C and D are the interested parties to the transaction (C is the potential or actual claimant and D is the defendant under the claim), and R is the Registrar and the nominal defendant.

3.88 Example (1). D executed and delivered a transfer of the N 1/2 of a section to C; the transfer reflected the mutual intentions of the parties; and C promptly submitted the transfer to R for registration. At common law C would already be the owner of the land had a deed been used. Absent suspicious circumstances, R would revise the appropriate register to make C the legal owner of the land, and no claim would ever be brought to a court.

3.89 Example (2). The facts are the same as in example (1), except that C submitted the transfer to R 12 years after it was executed. Again, at common law C would already be the owner of the land under a deed, and no limitation provision would preclude him from obtaining a judicial declaration to this effect. Because of the passage of time, R was suspicious and refused to register the transfer. He perceived the risk that the transfer would not have been valid as a common law deed for such reasons as forgery or nondelivery. C brought a claim requesting a judicial remedial order directing R to register the transfer. The court found, as the facts stipulate, that the transfer reflected the mutual intentions of the parties, and this finding would lead to a judicial order directing R to register the transfer. The court would be permitted to grant the necessary remedial order because of the exclusion now being discussed.

3.90 Example (3). The facts are the same as in example (1), except that R made an error and only revised the register to make C the legal owner of the NW 1/4; D remained the registered legal owner of the NE 1/4. Twelve years later the error was discovered and C requested R to revise the register to reflect the transfer. As in example (1), under a common law deed of the N 1/2 of a section C would already own the NE 1/4. R would probably make the requested revision, but if a claim had to be brought, the analysis would be the same as in example (2).

3.91 Example (4). D fraudulently induced C to execute and deliver a transfer of the N 1/2 of a section to him by telling C the transfer was a medical insurance claim. C did not realize he was executing a transfer. D promptly submitted the transfer to R for registration, and, there being nothing suspicious to alert R, D was registered as the legal owner of the N 1/2. Twelve years later C discovered the fraud and requested R to reregister him as the owner of the N 1/2 and to cancel D's registration. D disputed the factual allegations of fraud; R refused to make the requested revisions; and C brought a claim requesting a judicial remedial order directing R to make the requested revisions. At common law a deed executed under these circumstances would be void under the *non est factum* doctrine, and C would have remained the owner of the N 1/2. However, the mere existence of such a deed would have clouded C's ownership, and C could bring a claim requesting a judicial declaration that the deed was void. If C did, upon finding the facts as stipulated here, the court would issue the declaration. The declaration would not alter the legal relations between C and D; it would merely state what they had been. No limitation provision would apply to the claim for the declaration, and no judicial remedial order would be required. The analysis under the Torrens system is the same insofar as the declaration is concerned, and the situation is simply opposite to that in example (2). Upon finding the stipulated facts the court would declare that the transfer was invalid (rather than valid as in example (2)), and based upon this determination would issue a remedial order directing R to cancel D's registration and to reregister C as the legal owner of the N 1/2. As in example (2), neither the declaration nor the remedial order would be subject to a limitation provision under the Act.

3.92 Example (5). C executed and delivered a transfer of the N 1/2 of a section to D; D promptly submitted the transfer to R for registration; and R registered the transfer making D the legal owner of the N 1/2. The transfer, however, did not reflect the mutual intentions of the parties. The contract between C and D called for a transfer of the NW 1/4, and the transfer was incorrectly typed in the office of C's lawyer. Twelve years later C discovered the error and brought claims requesting the court to (a) rectify the transfer to read the NW 1/4 and (b) grant a remedial order directing R to cancel D's registration as to the NE 1/4 and to reregister C as legal owner of the NE 1/4. At common law a deed executed under these circumstances would be valid, and D would be the owner of the NE 1/4. In order to regain ownership of the NE 1/4, C would need an equitable remedial order rectifying the deed to read the NW 1/4. This would be a remedial order for it would alter the legal relations between C and D. At common law C would be required to bring a claim within the flexible time period established by the court under the equitable limitations system commonly called the doctrine of *laches*. Under clause 4(1)(e) of the present Alberta Act, C would be required to bring a claim for equitable rectification of the transfer based on mistake within six years from the discovery of the cause of action. Under the ultimate limitation period we have recommended, C would be required to bring this claim within ten years after the claim accrued. As the claim accrued 12 years before it was brought, D would be entitled to immunity from liability under the claim unless D fraudulently concealed the facts so as to suspend the operation of the ultimate period under a provision we will recommend in Chapter 7 of this report. If the transfer from C to D could not be rectified, the court would have no grounds upon which to grant a remedial order directing R to cancel D's registration as to the

NE 1/4.

Recommendation 21

> We recommend that the new Alberta Act provide that: this Act is not applicable to a claim requesting a remedial order for the revision of a register under the Land Titles Act.

D. The Crown

3.93 We will now consider claims by and against the Crown, in any of its capacities. As the foregoing sentence discloses, there are two basic issues: (1) should claims by the Crown be subject to the new Alberta Act, and (2) should the Crown as the defendant under a claim be entitled to the defence created by the Act. In addition, as to both the burdens and benefits of the Act, should the Crown, in all of its capacities, be treated the same way? We will begin with the benefits under the Act, which will arise when the Crown is a defendant.

(1) The Crown as defendant

3.94 We believe that the Crown, in all of its capacities, should enjoy the benefits of the new Alberta Act. There is no problem when the Crown in right of Alberta is the defendant under a claim because the Proceedings Against the Crown Act[45] applies in this situation. Pursuant to clause 1(b) of this Act "Crown" means Her Majesty the Queen in right of Alberta, and under subsection 21(1) the Crown may rely on any defence that would be available if the proceedings were between persons. What, however, if the Crown in some other capacity, such as in right of Canada or of another province, is the defendant under a claim?

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[45] R.S.A. 1980, c. P-18.

The basic application rule we have recommended is certainly comprehensive enough to subject a claim against the Crown in any capacity to the coverage of the new Alberta Act, and we have not recommended any provision which would exclude such a claim. Indeed, our basic application rule will confer the benefits of the Act on any governmental entity, including a foreign state which does not regard the Crown as the Sovereign, and we have not recommended a provision which would deny the benefits of the Act to any governmental entity. In short, under our recommendations, the Crown in any capacity will have the benefits of the Act, and we are not aware of any legal rule, constitutional or otherwise, which would preclude this.

(2) The Crown as claimant

3.95 We believe that the Crown, in all of its capacities, should be bound by the new Alberta Act. The Interpretation Act[46] is relevant to this subject. Pursuant to clause 25(1)(i) of this Act, "the Crown" means, in substance, the Crown in any capacity, and under section 14 no enactment is binding on the Crown unless it expressly states that intention. Although the present Alberta Act does not expressly bind the Crown, we will recommend that the new Alberta Act contain the standard Canadian binding clause used in legislative drafting. Because of clause 25(1)(i) of the Interpretation Act this binding clause will express the legislative intention that any claim brought by the Crown, in any capacity, is subject to the Act. Constitutionally, this clause will bind the Crown in right of Alberta, and it will bind the Crown in any other capacity insofar as the legislative power of Alberta permits.

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[46] R.S.A. 1980, c. I-7.

3.96 Section 38 of the Federal Court Act[47] is relevant in this context. Subsection 38(2) provides:

> (2) Except as expressly provided by any other Act, the laws relating to prescription and the limitation of actions referred to in subsection (1) [those in force in any province between subject and subject in respect of any cause of action arising in such province] apply to any proceedings brought by or against the Crown [in right of Canada].

This provision appears to subject any claim brought by the federal Crown, which arose in Alberta, to the Alberta limitations system, whether the claim was brought in the Federal Court or a provincial court in Alberta, and whether the claim is based on federal or provincial law.

Recommendation 22

> We recommend that the new Alberta Act provide that: the Crown is bound by this Act.

E. Limitation Provisions in Other Alberta Acts

(1) Limitation periods

3.97 In recent years there has been a significant increase in the number of statutes related to specialized socio-economic problems. Some of these specialized statutes revised existing legal rights, duties and remedies, and some of them created entirely new rights, duties and remedies. These statutes frequently include special limitation provisions governing the claims with which they are concerned, and this has produced two kinds of problems.

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[47] R.S.C. 1970 (2nd Supp.), c. 10.

3.98 The first type of problem may be described as locational. Although the present Alberta Act does not purport to comprise the entire Alberta limitations system, following the pattern of most relatively modern limitations acts, it is very comprehensive. Under our recommendations the new Alberta Act will also be comprehensive. Because one is likely to focus on a general limitations act when looking for an applicable limitation provision, there is a significant risk that he will overlook the relevant provision when it is located in a specialized statute. This situation is rightly considered a trap.

3.99 The second type of problem is more substantive. When a legislature is considering a limitations issue in the context of a specialized statute, it may have a propensity to resolve that issue in a different manner than it would if it were considering the issue in the context of and with regard to the overall policies of a comprehensive limitations system. Consequently, specialized statutes not infrequently contain limitation provisions applicable to particular claims which are inconsistent with the provisions applicable to analogous claims under a general limitations act. A specialized act is likely to describe the claims to which it applies by reference to the act itself, or according to the status of one of the parties. Analogous claims subject to a general limitations act are likely to be categorized more broadly, according to the type of remedy, the type of conduct which justifies the remedy, and the subject matter affected: for example, a claim to recover monetary damages for tortious personal injuries. Hence the categories in a general limitations act will frequently overlap the categories in a specialized act, and this will result in problems of statutory interpretation. A claimant who will be adversely affected by one of the acts will be encouraged to litigate the issue of which of the two competing acts was intended to apply to his particular claim. A court with sympathy for the claimant's plight will be inclined to decide the issue in order to achieve a just result in the particular case, and the net result after a series of cases is a body of complex and inconsistent precedents.

3.100 Before 1966 many specialized statutes in Alberta concerned narrowly defined tort actions and imposed varying but relatively short limitation periods. In 1966, pursuant to An Act to Amend the Law Respecting Limitation of Actions in Tort,[48] most of these special limitation periods were repealed, and all limitation provisions relating to tort actions were consolidated into Part 9 of the present Alberta Act.

3.101 There are still scores of specialized statutes in Alberta containing limitation provisions. A comprehensive list of these statutes is contained in the *Alberta Limitations Manual*.[49] The limitation provisions contained in most of these statutes are not within the scope of this report because they are within one of the following categories: (1) limitation provisions related to the time of commencement of prosecutions for provincial offences; (2) limitation provisions related to proceedings before administrative and ministerial authorities exercising statutory powers; (3) limitation provisions related to claims requesting judicial review of the exercise of statutory powers; and (4) limitation provisions related to litigation proceedings after the commencement of a civil judicial action.

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[48] S.A. 1966, c. 49.

[49] *Alberta Limitations Manual* (Butterworths 1983).

3.102 There are, however, many limitation provisions in specialized statutes which are within the scope of this report. Although we recognize that there would be advantages in consolidating all of these limitation provisions into the new Alberta Act, we will not recommend such a sweeping approach. Consolidation is not a panacea; it has its disadvantages. We are particularly concerned with those statutes which create unique new rights, duties and remedies. One relying on such a statute is likely to focus on the specialized act itself as the source of all of the law with respect to a newly created claim. If the limitation provisions relevant to the new claim were included in a general limitations act, there would be a significant risk that they would be overlooked. This situation would also constitute a trap.

3.103 As to each specialized act containing limitation provisions, we have four options. We could recommend that the limitation provisions (1) be retained in the specialized act unchanged; (2) be retained in the specialized act in a revised form; (3) be repealed, which would automatically subject the relevant claims to the new Alberta Act; or (4) be repealed, with a provision added to the new Alberta Act excluding the relevant claims from the coverage of that Act.

3.104 Because we can predict that limitation provisions will be retained in some specialized acts, it will be necessary for the new Alberta Act to expressly provide that it is not applicable to a claim which is subject to a limitation provision in any other enactment of the Province.

Recommendation 23

> We recommend that the new Alberta Act provide that: this Act is not applicable to a claim which is subject to a limitation provision in any other enactment of the Province.

3.105 We have decided to make no further recommendations in this report with respect to the limitation provisions in specialized acts. Deciding which of the options listed above should be selected for a particular specialized statute will involve difficult, and often conflicting, policy considerations. Moreover, the recommendations we have already made will, if accepted, result in a bold new limitations system in Alberta, and the choices we will make relative to the specialized acts will be influenced by the degree of acceptance of these recommendations. Consequently, we do not believe that the time which would be required to develop tentative recommendations in this report as to the disposition of the limitation provisions in the specialized acts would be efficiently devoted to that purpose.

3.106 Using the Alberta Limitations Manual as our primary source, we have compiled a list of the specialized statutes in Alberta which we believe are within the scope of this report, and we have included this list as Appendix C of this report. This is a Report for Discussion, and although we have made no recommendations as to the disposition of the limitation provisions in the statutes listed in Appendix C, we nevertheless invite comments on this general subject, for they will assist us in formulating the recommendations we will make in a subsequent Final Report on Limitations.

(2) Notice provisions

3.107 Several Alberta statutes contain provisions requiring a claimant to give a defendant notice of some event as a condition precedent to bringing an action. Sometimes these statutes contain exception provisions which, if satisfied, will relieve the claimant from the consequences of not giving the required notice. However, if the notice is not given within the time and in the form prescribed, and if the claimant cannot satisfy any available exception provisions, the claimant's action will be barred. Notice provisions, although not framed as limiting the time for the commencement of an action, have that effect, and hence must be distinguished from provisions establishing time limits for procedural steps after an action has been commenced. In our view notice provisions which can operate to limit the time available for the commencement of an action should be treated as part of the Alberta limitations system. Whether or not a particular notice provision should be retained depends on its utility and fairness in terms of the policy objectives of the statute in which it is included.

3.108 Notice provisions are vulnerable to serious criticism for several reasons. (1) The penalty for not giving a proper and timely notice is, in effect, loss of the claim. Although this same consequence will flow from the failure to bring a claim within an applicable limitation period, there can be important differences between the two situations. The time for giving a required notice is often very short, and a notice is often improper because of a technical deficiency. In this context, loss of a claim may be viewed as an unduly severe penalty. (2)

Notice provisions are frequently not generally known, and as we have said, the time for compliance is often short. This can set a trap for lawyers as well as laymen, and the lay person is particularly at risk if the notice had to be given before he could reasonably have been expected to even consult a lawyer. (3) Notice provisions may give a select group of defendants protective benefits which are not available to other defendants in the same situation. A notice provision which gives a class of defendants special protection from a narrowly defined category of claims may be justified because of some features unique to this category. Often, however, the category will be drafted too broadly, and will give a class of defendants special and unjustifiable protection from claims which have no unique features. (4) Statutes imposing notice requirements sometimes contain exception or "saving" provisions ostensibly designed to relieve at least some claimants from the harsh consequences of failure to give a required notice. As we shall point out shortly, because of the procedural and substantive hurdles contained in current saving provisions, claimants are seldom saved.

3.109 The notice provisions in Alberta statutes can be organized into three categories. The first, and most common, type requires that notice of some event be given within a specified time after the occurrence of the event. Usually the event is the sustaining of injury or damage. We refer to these as "notice after event" provisions, and we will take examples from the Municipal Government Act.[50] Subsection 402(1) applies to negligence claims against a municipality, based on personal injury or property damage, and requires the claimant to serve "notice in writing of the accident and the cause of it" on specified municipal officials "within 6 months of the happening of the accident". Subsection 404(2), which applies to claims for damage to person or property sustained by reason of snow, ice or slush on any street, sidewalk etc., requires the claimant to give notice in writing "of the claim and of the injury complained about" to the municipal secretary "within 21 days after the cause of action arises". Section 405, which applies to claims for damages because of the breach by a municipality of its duty to keep public property in repair, is similar to subsection 404(2), but the notice must be given "within 60 days after the happening of the injury".

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[50] R.S.A. 1980, c. M-26.

3.110 One justification for a notice after event provision is that it requires a claimant to give a defendant earlier notice of the events upon which a claim may be based than would be required by a conventional limitations provision, in a situation in which the defendant may have a genuine need for relatively prompt notice. We believe that a credible argument can be made that subsection 404(2) (harm caused by ice etc. on any sidewalk etc.) and section 405 (harm caused by disrepair of public property) of the Municipal Government Act are justified on the basis of this principle. In these situations the municipality's breach of duty will almost certainly have been caused by passive conduct, that is, by inaction or insufficient action. If a claimant suffers personal injury from slipping on an icy sidewalk, or property damage from an accident which occurred when his car hit a deep pothole in a street, the claimant will be aware of the event immediately, and he will be in a position to gather and preserve evidence. It is unlikely, however, that the municipality will have any knowledge of the event when it happened, and a conventional limitations system will only require the claimant to give notice to the municipality by bringing an action within the applicable limitation period, which could be some years after the evidence of the actual condition of the sidewalk or the street had disappeared. Subsection 404(2) and section 405, with their respective notice after event requirements of 21 and 60 days, will result in an alert to a municipality that it should conduct necessary investigations promptly.

3.111 It is far more difficult to justify subsection 402(1) of the Municipal Government Act on the basis of the principle discussed above. That subsection applies to all negligence claims against a municipality based on harm to person or property, and imposes a six-month notice after event requirement. The negligent conduct of municipal employees is, overall, more likely to be active than passive. If a City of Edmonton vehicle is involved in a serious collision, the driver will certainly know it, and through him and other employees the City will be alerted to the possibility of litigation. For this reason, we question whether a notice provision can be justified at all in the context of active torts. But even if it can be justified, we have been unable to discern any reason why municipalities should be given special protection against claims based on active negligence which is not available to other defendants in the same situation. What if the vehicle in question were owned by Alberta Government Telephones or by Woodwards? Why should the City of Edmonton merit special treatment?

3.112 Subsection 406(1) of the Municipal Government Act contains saving or exception provisions. It provides:

> 406(1) Failure to give or insufficiency of the notice under section 402, 404 or 405 is not a bar to the action if the court before whom the action is tried is of the opinion that there is reasonable excuse for the want or insufficiency of the notice and that the municipality was not thereby prejudiced in its defence.

The technical requirements of notice provisions have been enforced strictly. If a notice is not in writing, if it fails to contain the precise information called for, or if it is not served upon the proper official, it is insufficient even if it does give the defendant a warning which is, in substance, perfectly adequate. If the notice is insufficient, the claimant can seek relief only under a saving provision such as subsection 406(1). This subsection imposes two hurdles. The court must be satisfied (1) that there was "reasonable excuse" for the want or insufficiency of the notice, *and* (2) that the municipality was not thereby "prejudiced in its defence". The second hurdle is the lower of the two. A legally insufficient notice may, nevertheless, have given the defendant sufficient notice in fact so that its defensive capability was not prejudiced. Even if no notice was given, the defendant may have acquired the information necessary to avoid prejudice from its own sources. The first hurdle is much more difficult for a claimant to overcome. Neither ignorance of the requirements of a notice provision, nor carelessness in complying with its mandates, is a reasonable excuse. Rather, it would be a reasonable excuse if the claimant were misled by the defendant, or if he were unable to give the notice because of sickness or disability.

3.113 The second category of notice provisions consists of those which require that notice of some event be given within a specified time before an action is actually commenced. We refer to these as "notice before action" provisions, and we will take an example from the Insurance Act.[51] Section 210 applies to all insurance contracts except life insurance contracts, and bars an action to recover money payable under a contract unless proof of loss is made more than 60 days before the action is commenced. We believe that this provision is designed to give an insurer an opportunity to avoid litigation by giving it a reasonable time to make a required payment or to attempt to negotiate a settlement before an action is commenced.

3.114 The problem is that a notice before action provision can, in conjunction with a conventional limitation period, constitute a subtle but fatal trap for a claimant. A claimant may have delayed bringing an action until shortly before the expiration of a limitation period, usually because of settlement negotiations, knowing that his action could still be brought within that period. However, if he failed to comply with a preliminary notice before action provision, either because of ignorance or neglect, he would find his action barred by that provision even though it was not barred by the limitation provision.

3.115 The third category of notice provisions consists of those which do not fall into either of the two categories we have discussed above. We will refer to them as "miscellaneous" notice provisions.

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[51] R.S.A. 1980, c. I-5.

3.116 Notice provisions operate independently of conventional limitation provisions; they are not substitutes for the latter. Hence neither the repeal nor the alteration of a notice provision would have any effect on a limitation provision applicable to a claim, whether located in a general limitations statute or a specialized statute. Insofar as any notice provision is concerned, we believe that there are two options. The provision could either be (1) repealed or (2) amended. The retention of a notice provision would, of necessity, assume that it was justified as a general proposition. Amendments extending the notice period, or relaxing technical requirements, could be considered. We think it more probable, however, that amendments should focus on reducing the rigidity of the exception or saving provisions.

3.117 We have decided not to make any recommendations concerning notice provisions in this report. Notice provisions are always contained in specialized acts, and although the notice provisions in an act will operate independently of any conventional limitation provisions contained in the same act, there will be a policy relationship. Hence we believe that notice provisions and conventional limitation provisions included in specialized statutes should be considered together. The list of specialized statutes in Alberta which we have included as Appendix C of this report contains the statutes with notice provisions which we believe are within the scope of this report. We invite comments as to the disposition of these provisions, for they will assist us in developing future recommendations.

A. Basic Issue and Policy Objectives

4.1 When a claim brought in Alberta (the forum jurisdiction) will be adjudicated under the substantive law of another jurisdiction (the foreign jurisdiction) in accordance with the applicable principles of private international law (conflict of laws), the question of whether the limitations law of Alberta or that of the foreign jurisdiction should be applied to the claim will arise. This question will not have to be answered in a particular case if the relevant limitation provisions of the two jurisdictions are the same. But if they differ, there will be a conflict of laws issue. We believe that the new Alberta Act should contain a specific provision resolving this potential conflict of laws issue. However, how this issue should be resolved depends on the relative importance accorded to three policy objectives. They are (1) achieving the public policies reflected in the forum jurisdiction's own limitations system, (2) discouraging forum shopping, and (3) promoting comity (mutual respect) among jurisdictions. Unfortunately, a balanced measure of all three objectives can only be secured by a solution using judicial discretion. There are two viable solutions relying on a fixed rule; one will secure only the first objective and the other will secure only the second and third objectives.

(1) Achieving local public policy

4.2 A jurisdiction may quite legitimately believe that its limitations law is more productive of justice than is that of other jurisdictions. If a jurisdiction has laboured and developed its own limitations law, rather than adopted the limitations law common to other jurisdictions either to save time or to promote uniformity, it is likely to consider its limitations law as an important manifestation of its public policy, and to give its use a high priority. For this reason, it is unlikely to be willing to defer to the limitations law of other jurisdictions.

(2) Discouraging forum shopping

4.3 Virtually all conflict of laws scholars argue that, insofar as possible, the conflict of laws provisions of limitations law should discourage forum shopping. A claimant will frequently have a choice as to the jurisdiction in which he can bring his claim. Even though, because of the passage of time, his claim will be fatally affected by the limitations law of some jurisdictions, if he 'shops' around, he will often find a jurisdiction (a forum) whose limitations law will not adversely affect his claim. Conflicts problems in limitations law have not heretofore been serious in Alberta. There has been little evidence of forum shopping because the limitations law of the provinces is largely based on the 1931 Uniform Act and there have been few conflicts. However, there is already a trend away from uniformity in limitations law in Canada, and the new Alberta Act, which would probably be the most innovative in the common law world, would result in a significant departure from uniformity. It is, therefore, reasonable to assume that there would be more conflicts cases involving limitations issues under the new Alberta Act, and that Alberta would become vulnerable to forum shopping.

(3) Promoting comity

4.4 Conflict of laws scholars also argue that conflict of laws provisions in limitations law should promote comity among jurisdictions. If jurisdictions defer to and apply each others laws in appropriate cases, mutual respect among jurisdictions can be enhanced. The issue under consideration will arise only if the court in the forum jurisdiction has first decided, under its conflict of laws rules, to apply the substantive law of a foreign jurisdiction to the case before the court. The argument is that, if this principal decision has been made in the interest of comity among jurisdictions, the limitations law of the foreign jurisdiction should also be applied to the case.

B. The Traditional Solution

4.5 The traditional approach to resolving conflicts problems in limitations law, and the viable alternative solutions for these problems, can be best discussed in terms of an example. D, a resident of Alberta, while driving his car on a holiday in the Province of Foreign, struck and injured a pedestrian, C, who is a resident of Foreign. Although it is clear from the medical evidence that C sustained his injury at the time of the accident, C did not discover that his injury was serious until he first reasonably could have, more than two years after the accident. In Foreign the applicable limitation period began when the injury occurred and expired before C discovered that his injury was serious. However, in Alberta the applicable limitation period began when C discovered the seriousness of his injury and will not expire for several more months. But for limitations law, C would normally bring his action in Foreign for he resides there and most of the evidence as to the seriousness of his injury and the circumstances of the accident is available there. But Alberta is a reasonable alternative forum, for D resides there. In whichever jurisdiction the action is brought, whether Foreign or Alberta, the court will apply the substantive law of Foreign to determine whether or not D is liable to C on the merits, for the accident occurred in Foreign and the acts and omissions of C and D took place there. Thus whether or not D's conduct breached a duty owed to C, and whether or not C was contributorily negligent, will be decided under the law of Foreign, which is often called the law of the case. As the substantive law of Foreign will be applied, there is no reason why a court in Foreign would defer to the limitations law of Alberta. Rather, a court in a jurisdiction whose substantive law is controlling will apply its local limitations law, whether it is classified as substantive or procedural. The problem arises if the claim is brought in Alberta. If, under its conflict of laws rules, the Alberta court has chosen to apply the substantive law of Foreign as the law of the case, whose limitations law should it use?

4.6 Under the traditional approach, as the court in Alberta has chosen to apply the substantive law of Foreign to the case, it will apply the limitations law of Foreign as well *if* it classifies that law as substantive. However, limitations law is usually classified as procedural law for conflict of laws purposes, and an Alberta court will apply its own procedural law. Procedural rules, such as those contained in the Alberta Rules of Court, may affect the outcome of litigation, but they are not designed to determine whether or not a claimant is entitled to a remedy. Nevertheless, if the Alberta court classifies the limitations law of Foreign as substantive, and applies it to C's claim, the claim will be defeated. Thus, under the traditional solution, the issue of whose limitations law will be applied depends on how the Alberta court classifies the limitations law of Foreign. Limitations law is normally classified as procedural if it merely bars a remedy, and as substantive if it also extinguishes the underlying right. This is often a technical question, and the inquiry can be very complex if the foreign law is not based on the English common law. Moreover, we do not believe that the question of whether only the remedy is barred, or whether the right is also extinguished, has anything to do with the issue of whose limitations law should be applied to a claim as a matter of policy. Hence we do not think that codifying the traditional solution is a feasible law reform option.

C. Options for Reform

(1) Limitations law of forum

4.7 Alberta could opt to apply its own limitations law to claims governed by the substantive law of another jurisdiction, irrespective of how the limitations law of that jurisdiction is classified. This solution eliminates the classification problem. In terms of the three policy objectives discussed above, it achieves the public policies represented in the forum's own limitations system. This may reflect more, however, than mere parochial pride in the local limitations system. We have rejected the traditional solution which would require an Alberta court to apply the limitations law of Foreign merely because that law is classified as substantive. This does not mean that the procedural versus substantive distinction is irrelevant. We think that limitations law is properly classified as procedural law, and that courts should, as a general proposition, apply local procedural law. For example, rules of evidence are classified as procedural law, and an Alberta court will apply Alberta evidence rules in litigation before it. One of the most important reasons for a limitations system is to protect defendants from the injustice which can flow from litigation based on stale evidence. We think that this is a potent reason for a jurisdiction to apply its own limitations law to claims before its courts, even if the substantive law being applied is that of another jurisdiction.

4.8 There is another reason supporting option (1). Alberta might be willing to defer to the limitations law of a foreign jurisdiction if that law reflects the same legal philosophy and concepts of fairness as does the law of Alberta, and not otherwise. As we think it is impractical to draw such a distinction in a statute, Alberta could properly decline to defer to the limitations law of any other jurisdiction in order to insure the presence of a just limitations system.

4.9 There are two difficulties inherent to option (1), and they both stem from the policy supporting this option: that the forum courts should apply local limitations law in civil proceedings in those courts because that law reflects what the forum jurisdiction believes is the fairest balance between the conflicting interests of claimants and defendants.

4.10 Two prerequisites must be present before a forum court will be required to choose between two limitations systems.

Using the example under consideration, first, the Alberta court must have chosen, under its conflict of laws rules, to apply the substantive law of Foreign as the law of the case, and second, there must be a conflict between the two limitations systems. By choosing to apply, and hence to defer to, the substantive law of Foreign to decide the case on the merits, the Alberta court will have made the major decision. Presumably it will have been satisfied that applying the substantive law of Foreign will be fair to the parties under the circumstance. Why then should Alberta balk at deferring to the limitations law of Foreign, and make the minor decision through a legislative provision requiring the Alberta court to apply the local Alberta limitations law? It is argued that if Alberta is willing, in the interests of fairness and comity between two jurisdictions, to accept what could be a dog, it should not reject the dog's tail.

4.11 Option (1) will encourage forum shopping. In the example under consideration, C will bring his claim in Alberta because the applicable limitation period has expired in Foreign but is still running in Alberta. Why, however, is this a difficulty? We will assume that the limitations systems of both Foreign and Alberta are designed to strike a fair balance between the interests of claimants and defendants. Nevertheless, the two systems will probably blend elements which favor claimants and elements which favor defendants in different ways to strike the desired balance. Viewed singularly, each system will require claimants and defendants to take the bitter with the better: to take the advantages and the disadvantages as the jurisdiction blended them. In this example the limitations system of Foreign contains an element which favors D, and that of Alberta contains an element which favors C. C, however, can choose where to bring his claim and D cannot. Under option (1) C can shop for a forum whose limitations law will better his position and can avoid the bitter element in the limitations law of an alternative jurisdiction. If the limitations law of Foreign favored C, and that of Alberta did not, C would bring his claim in Foreign. Thus option (1) will always benefit claimants at the expense of defendants. It is argued that although this option purports to apply the fairly balanced limitations system of the forum, in effect it tilts the balance of that system in favor of claimants who can come in or stay out, and hence can take the better and avoid the bitter.

4.12 Section 21 of the 1982 Uniform Act selects option (1). As this Act is recommended for adoption by all Canadian jurisdictions, there will be no conflicts in limitations law between jurisdictions in Canada which do adopt it. However, under section 21, these jurisdictions will be vulnerable to forum shopping whenever the limitations law of another jurisdiction differs from the Uniform Act.

(2) Limitations law of foreign jurisdiction

4.13 Alberta could opt to apply the limitations law of the jurisdiction whose substantive law will control a claim, irrespective of how the limitations law of that jurisdiction is classified. This solution also eliminates the classification problem. It serves the objectives of discouraging forum shopping and promoting comity. In the example under consideration it was stipulated that an Alberta court would choose Foreign law as the substantive law applicable to C's claim. Under Option (2), this choice would draw with it the limitations law of Foreign. As a consequence, C's claim would be barred under the limitations law of Foreign whether the claim was brought in Foreign or Alberta.

4.14 It may be seen that option (2) does not achieve the public policy objectives represented in the forum's local limitations system. It is argued that this objective can be gained under option (2) in cases in which it is truly necessary. Whenever a claim is brought in Alberta, the Alberta court must determine, under Alberta's conflict of laws rules, whether the substantive law of another jurisdiction will govern the claim. Hence under option (2) the Alberta conflicts rules will also determine which limitations law will apply to the claim. These conflict of laws rules are within provincial jurisdiction; they can evolve as the Alberta courts and legislature see fit. Moreover, the common law of conflict of laws is evolving. Until recently the accepted approach was to utilize relatively mechanical choice-of-law rules which selected, as the substantive law of a claim, the law of the jurisdiction which was perceived as having the most significant relationship to the claim. There is now a marked trend in the direction of flexibility, for courts are giving increased weight to choice-of-law contractual arrangements of the parties, and to the public policies reflected in the forum's own legal regime. If Alberta courts follow this trend, it can be expected that they will be more likely to select Alberta law as the substantive law of a claim brought in Alberta if they believe that strong Alberta notions of justice require the use of Alberta law.

4.15 Law reform agencies in England and the United States have recently recommended the adoption of option (2). The English Law Commission did so in 1982.[52] Section 2 of the Uniform Conflict of Laws - Limitations Act, recommended by the Commissioners on Uniform State Law (United States) in 1982, adopts option (2). The Commissioners were aware of the potential problem, discussed in connection with option (1), that although a jurisdiction might be willing to choose the substantive law of another jurisdiction as the law of a claim, it might still be unwilling to apply the limitations law of that jurisdiction in an extreme case when that law was substantially different from the limitations law of the forum and would operate unfairly in terms of the concepts of elemental fairness accepted in the forum jurisdiction. Section 4 of the United States Uniform Act, quoted below, contains an escape clause. The Commissioners comment: "An 'escape clause' is needed, but it is not designed to afford an 'easy escape'."

> 4. Unfairness
>
> If the court determines that the limitation period of another state applicable under Sections 2 and 3 is substantially different from the limitation period of this State and has not afforded a fair opportunity to sue upon, or imposes an unfair burden in defending against, the claim, the limitation period of this State applies.

(3) Judicial discretion

4.16 Alberta could give its courts discretion as to which limitations law to apply to a claim.

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[52] The Law Commission, *Report on Classification of Limitation in Private International Law*, (Law Com. No. 114, 1982).

4.17 The United States Uniform Act adopts option (2). However, section 4 of the Act, quoted above, grants the court a discretion when the limitation period of the foreign jurisdiction is "substantially different" from that of the forum jurisdiction. If the foreign period is substantially shorter, the court can apply the forum period in fairness to the claimant. If the foreign period is substantially longer, the court can apply the forum period in fairness to the defendant. Hence we observe, with little surprise, that the Act recognizes that when the periods differ substantially, the forum period reflects fairness.

4.18 Section 13 of the B.C. Act adopts the traditional solution in part. If the foreign limitations law is classified as substantive, it must be applied. But, if the foreign limitations law is classified as procedural, the court is given discretion to apply the limitations law of either British Columbia or the foreign jurisdiction, whichever will produce the more just result. We must presume that the B.C. Act incorporates limitation provisions which the legislature of British Columbia considered would produce the most just results. With respect, if that is so, we fail to see any theoretical or practical basis for conferring discretion on a court to choose foreign limitations law in order to produce a more just result. To choose the foreign limitations law would necessarily override the limitations policy reflected in the B.C. Act.

4.19 The provisions from the United States and British Columbia which we discussed above suffice to convince us that, if a jurisdiction wishes to insure that just limitation provisions are applied to claims before its courts, it must select option

(1); it must apply its own limitations law as that is the law which expresses its best judgment as to balanced justice. In this context, it is our view that judicial discretion can only produce confusion and unwarranted litigation.

D. Summary and Recommendation

4.20 The foregoing analysis leads us to the conclusion that options (1) and (2) are the only sound alternatives. Although the decision between these alternatives has not been easy, we will recommend option (1). We do not believe that option (1) will have an erosive effect on comity among jurisdictions. Limitations law has generally been considered procedural law and we think that it should be so classified. Under accepted conflict of laws principles, jurisdictions are free to apply their own procedural law to cases before their courts.

4.21 The possibility that option (1) might encourage forum shopping does concern us. On balance, however, we think that this potential difficulty is overstressed; we believe that it exists more in theory than in actual practice. As we have said, conflicts problems in limitations law have not heretofore created problems in Alberta. The fact that the limitations law of the provinces has been relatively uniform under the 1931 Uniform Act has no doubt reduced the incidence of conflicts in limitations law. But that cannot be the only factor. Alberta receives thousands of visitors each year from foreign nations, and for many years now a large percentage of Alberta's commercial transactions have been international transactions. This has not yet bred serious conflicts problems in limitations law, and we do not believe that it will in the future.

4.22 We have already recommended that the new Alberta Act be applicable to any civil judicial claim brought before an Alberta court requesting a remedial order, except as otherwise provided. Under option (1), no provision providing otherwise is necessary. However, our basic application rule will only define the coverage of the new Alberta Act. We believe that the entire Alberta limitations system, which will include limitation provisions in other Alberta acts, should be applicable to claims brought before Alberta courts. For this reason, and because of the overall importance of the conflict of laws issue, we believe that the new Alberta Act must contain an express conflicts rule.

Recommendation 24

> We recommend that the new Alberta Act provide that: the limitations law of the Province shall be applied to any claim brought in the Province, notwithstanding that, in accordance with the principles of private international law, the claim will be adjudicated under the substantive law of another jurisdiction.

CHAPTER 5. CLAIMS ADDED TO A PROCEEDING

A. Basic Problems

(1) Competition between civil procedure policy and limitations policy

5.1 Chapter 5 is concerned with limitation problems which arise as a consequence of the addition of claims in a proceeding previously commenced. Under the modern approach to civil procedure it is considered desirable, for reasons of justice and judicial efficiency, to have all of the claims which result from related conduct, transactions and events adjudicated in a single civil proceeding. To achieve this goal the rules of civil procedure take a liberal approach to the addition of claims through new and amended pleadings. Nothing in the new Alberta Act which we propose would inhibit a party from adding a further claim directly, or from adding one indirectly by an amendment which changes the substance of or the parties to a prior claim in such a way as to create a new claim, if the added claim is brought within the limitation period applicable to it. The problem arises when the added claim which results from a new or amended pleading would be subject to a limitations defence. In this situation, if the court were disposed to permit the addition of the claim in order to secure the trial on the merits of all claims arising from related conduct, transactions and events, there would be a conflict between procedural policy and limitations policy.

5.2 Consider the following example. On January 1, 1984 C and D1 were involved in a two-car automobile accident in which each of them was a driver of one of the cars; both suffered personal injuries and both cars were considerably damaged; both discovered their personal injuries and the damage to their respective cars on the date of the accident; and C brought a claim against D1 on December 28, 1985. D1 believes that C's conduct was at least partially responsible for the accident. Until C brought a claim against him, D1 was willing to suffer his harm in silence. However, in January 1986 D1 added a counterclaim against C.

5.3 Under the rules of civil procedure D1 can file this claim against C. However, C would clearly have a defence to the claim under the discovery limitation period we recommend, for the claim would have been brought more than two years after D1 discovered the facts which triggered the beginning of this period. The traditional response of the court would be to apply the *Weldon* rule, based on *Weldon* v. *Neal*:[53] a claim cannot be added to a proceeding after the expiration of the limitation period applicable to that claim. Although recent cases, such as *Cahoon* v. *Franks*,[54] have relaxed the rule, its ambit is uncertain and it remains a problem.

5.4 Moreover, the extent of the problem can be demonstrated by an extension of the example under consideration. Assume that D2 operated a repair business and might have been negligent in repairing the brakes on the car driven by D1, and that D3 was the manufacturer of possibly defective parts which D2 installed in D1's car. Both C and D1 wish to add claims against D2 and D3. At this point none of the actors involved knows how the court will determine the ultimate liability issue which the case presents. Liability may be imposed on any one or a combination of them. Each of them may, therefore, want to add claims for contribution from the others. Assume--and a factual scenario to make this assumption credible could be developed--that all of these claims would be subject to a limitations defence, under either the discovery limitation period or the ultimate limitation period we recommend.

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[53] (1887) 19 Q.B.D. 394.

[54] [1967] S.C.R. 445.

5.5 If all of the claims set forth were to be litigated at all, as they all arise from related conduct, transactions and events, the court would most probably want them to be tried in a single civil proceeding. This would be more efficient in terms of judicial time, and would probably result in a more just adjudication because the court would have a better overall view of the related facts. If, because of the defences available under limitations law, none of the claims except C's initial claim could be tried at all, the action would certainly be efficient in terms of the court's time. But justice might have been relegated to the back seat, for the court would be forced to adjudicate only the events which took place in the last act of a three-act tragedy.

(2) Imprecise meaning of "claim"

5.6 So far the example under consideration has focused on the addition to a proceeding of what would almost certainly be defined as new claims. However, whether or not an amendment to a pleading will result in a new claim is frequently a difficult issue. As we stated in paragraphs 2.201-202, the dimensions of a claim cannot be identified with precision. At the narrow end of the spectrum of possible meanings, a claim may be based on the breach of a specific duty owed to a claimant. But when does one breach of duty stop and another begin? This is an acute problem in the context of a negligence claim, for the gravamen of a negligence claim is the harm suffered by the claimant. At what point does one injury, and hence one claim, evolve into another distinct injury and claim? The law offers no clear answers to these questions. Still at the relatively narrow end of the spectrum, each remedy sought by a claimant may be considered a separate claim. Finally, at the broad end of the spectrum, a claim may be based on the entire aggregate of facts relevant to a series of related transactions and events.

5.7 The initial pleading of any party to a civil proceeding is frequently immature. This does not necessarily reflect sloppy practice. Quite the contrary. As any experienced trial lawyer appreciates, a claim, like good wine, will often mature; as additional facts are uncovered, a claim may be shaped. New allegations as to the causal facts, the harm suffered and the legal grounds for the claim may be made, and additional remedies may be sought. Not infrequently a claim will misdescribe the claimant or the defendant. Will amendments in these situations produce a new claim? In short, it is very difficult to determine when amendments to a claim will so change the substance of the claim or a party to it that they produce a new claim which is subject to a limitations defence. Whether or not a new claim is produced by amendments is a legal issue which must be resolved within the context of each specific case.

B. Institute Proposal

5.8 The subject of the addition of claims in a proceeding previously commenced is discussed in a thorough article by Professor Barry D. Watson entitled "Amendment of Proceedings After Limitation Periods".[55] Much of our discussion in the remainder of this chapter is based on Professor Watson's article, and although our recommendations are based, in substance, on model rules of court which he proposed, our recommendations do deviate from his proposals on some technical drafting points, and on one broad issue of strategy.

5.9 The generally accepted method of accommodating civil procedure policy and limitations policy is to deprive a defendant of a limitations defence to an added claim which he would otherwise have when the interests of justice would be furthered by permitting the adjudication of the claim in an action previously commenced, subject to conditions designed to secure the substantive objectives of limitations law for defendants. The provisions depriving a defendant of an otherwise available limitations defence, therefore, create exceptions to the general limitation provisions. Obviously, if a claim is added to a proceeding within the limitation period applicable to the claim, or if an amendment to such a claim does not create a new claim, the exception provisions will not be relevant.

5.10 Section 4 of the B.C. Act contains exception provisions for claims added to an action previously commenced. The B.C. Act, which was enacted in 1975, was based on the

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[55] B.D. Watson, "Amendment of Proceedings After Limitation Periods" (1975) *Can. Bar Rev.* 237.

B.C. Report, which was published in 1974, before publication of the Watson article. The section 4 exception provisions are broader than those proposed by Professor Watson because they contain minimal requirements to give limitations protection to defendants.

5.11 Subsections 19(1) and (3) of the 1982 Uniform Act are based, respectively, on subsections 4(1) and (2) of the B.C. Act. However, section 20 of the 1982 Uniform Act is substantially identical to Professor Watson's proposals. Because the Watson proposals constitute a comprehensive scheme for dealing with added claims, we believe that the 1982 Uniform Act provisions, which include sections 19 and 20, are both redundant and potentially inconsistent.

5.12 We have said that our recommendations deviate from Professor Watson's proposals on one broad issue of strategy. His article is entitled "Amendment of Proceedings After Limitation Periods", and throughout the article he describes the basic problem in terms of a court's lack of power to permit an amendment, of proceedings or pleadings, if the amendment would result in a claim subject to a limitations defence. If a party is required to obtain judicial permission for an amendment, and if the court would allow the amendment if the only issue concerned civil procedure policies, the court will, nevertheless, not permit the amendment if it would result in a claim subject to a limitations defence. In practice, the court will decide if the amendment would produce a claim subject to a limitations defence, and if so, will enforce limitations policy by not allowing the amendment. Professor Watson's strategy is to solve the problem by rules of court under which a court is given power to allow an amendment changing the claims asserted in an action, notwithstanding the expiration of a relevant limitation period, when alternate requirements providing limitations protection are satisfied. Thus the theory is that the broadened amendment power draws with it the power to override a limitations statute. Professor Watson recognizes that there may be problems under his strategy.[56] In most provinces in Canada the rules of court are not validated by legislation, and those provinces which do validate them by legislation do so periodically, with the result that relatively new rules or changes to rules may not be validated. The first problem is that an unvalidated rule which empowered a court to permit an amendment which resulted in a new claim subject to a statutory limitations defence, and to deny that defence to the defendant, would almost certainly be held invalid. A second statutory interpretation problem could arise under a rule validated by legislation. A validated rule giving a court broad powers to permit the addition of claims in a proceeding could be intended to accomplish civil procedure objectives, and not be intended to either conflict with or override a limitations act when an added claim is subject to a limitations defence. To avoid the problem of conflicting enactments, a rule intended to take precedence over the provisions of a limitations act should clearly express this intention. We prefer to take a more direct approach and to state the issue as whether, and in what situations, a defendant under a claim added in a proceeding should be denied a limitations defence he would otherwise have, and to provide for this result in the new Alberta Act.

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[56] *Id*. at 296-97.

(1) Proceeding previously commenced

5.13 We believe that the new Alberta Act should provide that, notwithstanding the expiration of the relevant limitation period, when a claim is added to a proceeding previously commenced, either through new pleadings or an amendment to pleadings, the defendant will not be entitled to a limitations defence to the added claim if requirements giving the defendant alternate but adequate limitations protection are satisfied. The foregoing statement contains a threshold requirement; the exception provisions will apply only to a claim added to a proceeding previously commenced. This initial requirement will benefit defendants for it restricts the exception provisions to the situation in which they are most needed to accommodate the civil procedure objective of permitting the adjudication of related claims in a single proceeding.

5.14 Unfortunately, this restriction will leave a problem which is not solved by our recommendation, and which we do not think is solved by Professor Watson's proposals. Assume that an action was purportedly brought (1) by C (through a lawyer) a few days after C died, (2) by C against D1 a few days after D1 died, or (3) by C as a personal representative before his appointment. It has frequently been held in cases of this type that the purported action is fatally defective and a nullity. As a result, there is no valid pleading which is capable of being amended and there is no proceeding to which a claim can be added. If an exception provision is made applicable to this type of case, it will of necessity permit an action to be commenced against a defendant through an untimely claim. Although we are not disposed to permit this, we invite comments on this issue.

5.15 The central point of our recommendation will be the added claim. In a complex civil proceeding there will be a webb of interlocutory proceedings, such as "counterclaims", "cross claims", "set-offs" and "third party proceedings". These are the words and phrases used by lawyers to distinguish the specific procedural situations in which parties bring claims against others in a proceeding already commenced. These words and phrases, although useful to lawyers, are not subject to precise definition, and it will not be necessary for us to use them in our recommendation; the crucial fact is that a claim may have been added to a proceeding previously commenced. Whether a claim was added in one procedural situation or another will not be relevant, and dispute on this type of issue will be eliminated.

5:16 Our recommendation will not relieve a court from the task of deciding the legal issue of whether or not an amendment to a pleading does or does not produce an added claim, if that claim would be subject to a limitations defence, and this does not trouble us. However, because of the exception provisions our recommendation will create, the significance of such a decision will be substantially reduced in many cases. If the court decides that a limitations defence is not available to the defendant because a pleading amendment did not produce an added claim, the court can bolster its decision by an alternative factual determination that, even if an added claim were produced, an exception provision applies and eliminates the limitations defence.

(2) No change of party

5.17 We have said that, although our recommendation will deny an otherwise applicable limitations defence to a defendant, it will do so only under conditions giving the defendant alternate limitations protection. Under our recommendation, the extent of the protective requirements will vary depending on whether the added claim makes any change with respect to a party, and if so, whether the change involves the claimant or the defendant. Insofar as the protective requirements are concerned, our recommendation will be drafted in terms of three categories of added claims. The first category of claims will consist of those which make no change with respect to a party.

5.18 When the added claim does not add or substitute a party, or change the capacity in which a claimant sues or a defendant is sued, the added claim must be related to the conduct, transaction or events described in the original pleading in the proceeding. It may be seen that both parties to the added claim must already have been parties to the proceeding and that no change can have been made with respect to their description, and that the only protective requirement is what we will refer to as the "relationship requirement"; the added claim must be related to the conduct, transaction or events described in the original pleading in the action.

5.19 Under this exception provision, in terms of the example under consideration, the original claimant (C) could add a further claim against the original defendant (D1), and this claim would of necessity be brought by a pleading amendment. The claim might be defined as an added (or new) claim because it (1) pleaded a new legal theory in support of a claim previously made, (2) requested a different remedy for an injury previously alleged, (3) alleged a distinct new injury, or (4) alleged an increase in the magnitude of the damage resulting from an injury previously alleged. D1 could bring a claim against C, by way of counterclaim or set-off, and this claim could be brought in either D1's first pleadings or by amended pleadings. Under this exception provision, *if* either C or D1 made D2 a defendant *through a timely claim*, D2 could add a claim against his claimant by way of counterclaim or set-off. D1 and D2 could continue to add claims, just as C could, as long as the added claim satisfied the relationship requirement.

5.20 The relationship requirement is designed to serve several purposes. We have said that the adjudication of related claims in a single civil proceeding is an objective of civil procedure policy. The added claim need only be related to the conduct, transaction or events described in the original pleading in the action. We think that "related" is a roomy word which will give the courts ample latitude to adjudicate claims in a single proceeding whenever this is desireable. Therefore, we do not think there is any sound reason to deny a defendant a limitations defence when an added claim does not satisfy the relationship requirement.

5.21 The relationship requirement may also assist the claimant to exercise some control over the eventual size of the civil proceeding which he commenced, for the conduct, transaction or events which he described in his original pleading will operate as a screen determining which added claims may remain subject to a limitations defence notwithstanding the exception provisions.

5.22 Finally, the relationship requirement should eliminate any possible prejudice to a defendant under the exception provision we are considering. Under this provision, the defendant (unless the original claimant) must have been made a party to the action under a timely claim, he will know of the conduct, transaction or events described in the original pleading in the action, and he will be able to gather and preserve evidence as to any possible claims against him based on the described conduct, transaction or events. Thus, although a claim against the defendant may be added after the expiration of the limitation period applicable to the added claim, the defendant should not be vulnerable to surprise because the added claim must be related to the described conduct, transaction or events which he will already be aware of.

(3) Change of claimant

5.23 The second category of added claims we will discuss consists of those which make a change with respect to the claimant, but not the defendant. When we subsequently discuss the third category of added claims, which consists of those which make a change with respect to the defendant, we will consider the extent to which the discovery rule we have recommended will assist claimants in bringing timely added claims, and which will, therefore, reduce the need for an exception provision. However, for added claims in the second category, the discovery rule will be of no assistance to claimants, for the commencement of the discovery limitation period will not be delayed until someone, whether client or lawyer, discovers who the proper claimant is or should be.

5.24 When the added claim adds or substitutes a claimant, or changes the capacity in which a claimant sues, the exception provision we recommend will contain three protective requirements for defendants. (1) The added claim must satisfy the relationship requirement which we have discussed. (2) The defendant must have received, within the limitation period applicable to the added claim plus the time provided by law for the service of process, sufficient knowledge of the added claim that he will not be prejudiced in maintaining a defence to it on the merits. We will refer to this as the "knowledge to avoid prejudice requirement". (3) The court must be satisfied that the added claim is necessary or desirable to ensure the effective enforcement of the claims originally asserted or intended to be asserted in the proceeding. We will refer to this as the "enforcement of original claims requirement".

5.25 When an added claim makes a change with respect to the claimant, the added claim will usually either seek to add a true stranger to the proceeding as a claimant, or will result from an amendment to a claim seeking to correct the description of the claimant. We will discuss the latter situation first.

(a) Misdescription of claimant

5.26 When an amendment to a claim is made to correct a misdescription of a claimant, the courts have attempted to deal with the situation by distinguishing between two types of misdescription. In a case of the first type, called "misnomer", there was an intended claimant who was misnamed by mistake, whereas in a case of the second type, the wrong claimant was intentionally named by mistake. In a typical misnomer case, the intended claimant, properly described as John C. Doe, Junior, was known, but because of a failure in communication between the claimant and his lawyer, the modifying "Junior" was omitted in the claim, which thus misnamed the claimant and accurately described his Father. In cases of this type, the courts have held that an amendment of the claim will not add or substitute a new claimant so as to create a new claim, but will merely correct the misnomer of the claimant already before the court. When a court can apply the misnomer doctrine, no claim will be added to the proceeding, and an exception provision would not be relevant.

5.27 However, in a case of the second type, the wrong claimant was named, intentionally but mistakenly. Often the case will have involved a choice between two possible corporate claimants, and the incorrect choice was made; a parent corporation was incorrectly named in lieu of a subsidiary, or a residual corporate shell was named in lieu of a new corporation created in a merger. Technically, an amendment in cases of this type will add or substitute a new claimant and will thus create a new and added claim. The distinction between a case of misnomer and one of wrong claimant is highly conceptual, and we doubt if it solves the problem in a sensible way. Moreover, because the distinction is so subtle, courts can apply the misnomer doctrine to a case of wrong claimant, and hence the distinction does not always lead to predictable results. The exception provision we recommend will permit the addition or substitution of the proper claimant in any misdescription case.

(b) Addition of true stranger as claimant

5.28 There are two types of cases in which a stranger may wish to add himself as a claimant in an action, and in the first type of case it is doubtful if he will be a "true" stranger. In the first type of case, the added claimant will be necessary if the original claim asserted is to be enforced effectively. The most common example is the case in which a married woman or a child requested damages in a personal injury action based on expenses for items which a husband or a parent was responsible for providing. If the married woman or child suffered no damage because of the expenses, only the husband or parent could suffer damage and recover damages. The exception provision we recommend will permit the addition of a claimant, and hence the addition of a new claim, in this situation.

5.29 In the second type of case a nondiligent claimant will be attempting to slip his untimely claim into an action in which his defendant is already a party. For example, assume that C1 brought a timely claim against D to recover for personal injuries suffered in an automobile accident, and that later C2, a copassenger in the car driven by C1, sought to add an untimely claim against D to recover for C2's personal injuries. C2's claim would probably satisfy the relationship requirement, and it might satisfy the knowledge to prevent prejudice requirement. However, C2's claim would be based on a different injury from that suffered by C1, and C2's added claim would not be necessary to ensure the effective enforcement of the original claim brought by C1. We do not believe that D should be deprived of a limitations defence to the untimely claim of C2.

(c) Protective requirements

5.30 In paragraph 5.24 we outlined the protective requirements we believe should be imposed when the added claim results from a change with respect to the claimant. We will now discuss them in more detail.

(i) Enforcement of original claims requirement

5.31 We will consider the enforcement of original claims requirement first because in paragraph 5.29 we have just pointed out the type of case it is designed to exclude from the exception provision we recommend. When an added claim results from the addition or substitution of a claimant, or a change in the capacity in which a claimant sues, because of an amendment required to correct a misdescription of the claimant, the added claim will be necessary or desirable to ensure the effective enforcement of the claims originally asserted in the proceeding. Similarly, there are cases in which an added claim of a stranger, although hardly a "true" stranger, will satisfy the enforcement of original claims requirement. This requirement is imposed, therefore, to screen out any remaining cases.

(ii) Relationship requirement

5.32 We discussed the relationship requirement when the added claim made no change with respect to a party in paragraphs 5.20-22. That discussion is also applicable when the added claim results from a change with respect to the claimant, but makes no change with respect to the defendant. We believe that the relationship requirement will provide a defendant with sufficient protection in most cases within this category. Because the added claim will have made no change with respect to the defendant, he will have been made a party under a prior claim, and within the limitation period applicable to that claim, whether it was the discovery period or the ultimate period. The defendant will be aware of the conduct, transaction or events described in the original claim against him. Although a claim against the defendant may be added after the expiration of the limitation period for that claim, if the only change is with respect to the claimant, the internal substance of the added claim will remain the same as in the prior claim. Even if the added claim contains internal substantive changes as well, it still must be related to the described conduct, transaction or events the defendant will already know about.

(iii) Knowledge to avoid prejudice requirement

5.33 Notwithstanding the relationship requirement, we believe that the knowledge to avoid prejudice requirement should also be imposed. When an added claim results from a change with respect to the claimant, the defendant may be prejudiced, within the context of limitations policy, if he does not learn of his vulnerability to a claim by the "new" claimant until *after* he would have received this knowledge had the added claim been timely. The protective requirement will provide that the defendant must have received, within the limitation period applicable to the added claim plus the time provided by law for the service of process, sufficient knowledge of the added claim that he will not be prejudiced in maintaining a defence to it on the merits.

5.34 We believe it will be helpful if we comment on the concept of prejudice within the context of limitations policy. The exception provisions must insure that defendants are accorded the substantive benefits of a limitations system. The limitation periods under the new Alberta Act will operate relatively mechanically. Subject to the discretion given to the courts for equitable remedies, if the claimant brings his claim within the relevant limitation period, the defendant is not given a limitations defence. The defendant may have obtained so little knowledge of the claim before it was brought that the delay permitted by the limitations system *will* prejudice his ability to maintain a defence to it on the merits. Subject to the discretion for equitable remedies, the court will have no discretion to consider this possibility. Alternatively, if the claimant does not bring his claim within the relevant limitation period, the defendant is given a limitations defence. The defendant may have obtained so much knowledge of the claim before it was brought that the delay *will not* prejudice his ability to maintain a defence to it on the merits. The court would normally have no discretion to consider this possibility. However, in this latter situation the provision we recommend will create an exception from the normal operation of the new Alberta Act. Even if the claim is not brought within the relevant limitation period, the defendant may be denied a limitations defence. We do not think this should be permitted if it *will* prejudice the defendant by placing him in a worse defensive position than he would have been in had the claim been timely.

5.35 The knowledge to avoid prejudice requirement contains two elements designed to safeguard the defendant. First, it provides that the defendant must have received sufficient knowledge of the added claim that he will not be prejudiced in maintaining a defence to it on the merits. This element will clearly require the court to exercise judicial discretion, but the objective of the provision is so clearly and simply stated that the courts should not experience problems of interpretation.

5.36 The second element specifies that the defendant must have received the sufficient knowledge within the limitation period applicable to the added claim plus the time provided by law for the service of process. We will discuss this requirement under the example we presented: C and D1 were involved in an automobile accident on January 1, 1984, and C brought claims against D1 on December 28, 1985, just before the two-year discovery limitation period expired on December 31, 1985. C asserted two claims, one based on his personal injuries and one based on the damage to "his" car. In early April 1986 C remembered that "his" car was in fact owned by his corporation, C,Ltd. On April 8, 1986, C filed an amendment to the claim based on damage to the car, substituting C,Ltd. as the claimant, and served the amended claim on D1 the following day. The amendment of the original claim in this example will in all probability result in an added claim brought after the expiration of the discovery period on December 31, 1985. Assume that D1 will be in a worse defensive position with C,Ltd. as a claimant under the added claim than he would have been had C remained the claimant; that D1 had no knowledge that he was vulnerable to a claim by C,Ltd. until he was served with the added claim; and that the time provided by law for the service of process is one year. Whether or not D1 will be prejudiced by the added claim as a matter of fact, he will not be prejudiced insofar as limitations policy is concerned. Had the amendment substituting C,Ltd. as the claimant in the original claim been filed on December 31, 1985, the day the discovery period expired, the resulting added claim would have been timely. Because of the one year allowed by law for the service of process, the amended (added) claim need not have been served on D1 until December 31, 1986. Until D1 was served with the added claim, he would not have known that C,Ltd. had become the claimant, and he would not have derived the benefits of the limitations system. In the actual example under consideration, D1 was served with the added claim on April 9, 1986, and hence received full knowledge of the claim before he might have received this knowledge had the added claim been timely and had service on him been delayed. In this example, under the exception provision we recommend, D1 received the substantive benefits of the limitations system. However, if D1 had not been served with the added claim until after December 31, 1986, and if he had not received the required sufficient knowledge of it in some other manner by this date, then the issue of whether or not he was prejudiced in maintaining a defence to it would be very relevant.

(4) Change of defendant

5.37 The third category of added claims consists of those which make a change with respect to the defendant. When the added claim adds or substitutes a defendant, or changes the capacity in which a defendant is sued, the exception provision we recommend will contain two protective requirements for defendants. The added claim must satisfy (1) the relationship requirement and (2) the knowledge to avoid prejudice requirement.

5.38 At the outset we wish to point out two subjects which we will consider more fully in our subsequent discussion. (1) When an added claim makes a change with respect to the defendant, it will frequently be a timely claim because of the discovery rule we recommend, and this will reduce the need for an exception provision. (2) The exception provision under consideration will, to an extent, undermine the protection which the ultimate limitation period would otherwise provide.

5.39 Recall that when an added claim makes a change with respect to the claimant, it will usually either add a stranger to the proceeding as a claimant or result from a correction of the description of the claimant. The situations are comparable when the added claim makes a change with respect to the defendant. The added claim will usually either add a stranger as a defendant in the proceeding, or will result from an amendment of a claim correcting the description of the defendant.

(a) Misdescription of defendant

5.40 Frequently the defendant under an added claim will have been connected with the action in fact if not in law, will have had knowledge of the action, and will have been misdescribed in the claimant's original claim. As in cases in which the claimant was misdescribed, the courts have attempted, at least in theory, to distinguish between misnomer cases and wrong defendant cases. In theory a misnomer case is based on a factual finding that the claimant "knew" that the defendant was John C. Doe, Junior, but misnamed him as his Father, John C. Doe. Many of the cases involve situations in which the claimant "knew" the particular governmental entity he wanted to sue, but did not "know" the proper legal name for the entity, and hence misnamed it. In these cases the courts have held that an amendment to pleadings will not add or substitute a new defendant so as to create a new claim. Rather, it will merely correct the misnomer of the defendant before the court. Because the courts have solved the misnomer cases, the exception provision we recommend will not be necessary for this purpose.

5.41. We doubt that the discovery rule we recommend will assist a claimant in a misnomer case. The discovery period will not begin until the claimant knew, or ought to have known, that his injury was to some degree attributable to conduct of the defendant, which presupposes knowledge of the identity of the defendant. If the claimant "knew" who the defendant was, but misnamed him, the discovery period could have begun, and if it expired before the claimant amended his claim, only the judicial doctrine that the amendment merely corrected the name of the defendant, and did not add or substitute a new defendant, would salvage the claim. Without the misnomer doctrine an exception provision would be necessary.

5.42. In the second type of misdescription case, it is assumed that the claimant misdescribed the defendant because he did not "know" who the defendant really was. For example, he thought the defendant was D1, a sole proprietor, when the defendant should have been D1,Ltd., a corporation. Technically, an amendment in these cases adds or substitutes a new defendant, and creates a new claim. Although courts have sometimes applied the misnomer doctrine to these cases, it is difficult to predict when they will do so. However, we believe that the discovery rule we recommend will usually salvage a case of this type for a claimant, for the discovery period will not begin before the claimant knew, or should have known, the identity of the defendant. The claimant will already have brought a claim attempting to describe the proper defendant. When he discovers his error, and hence the proper defendant, it can reasonably be assumed that he will make an amendment promptly, and that the resulting added claim will be brought within the discovery period. The exception provision will probably be necessary only when the ultimate limitation period is applicable.

(b) Addition of true stranger as defendant

5.43 An added claim will frequently add a true stranger as a defendant in a proceeding. Assume that C brought a timely claim alleging that D1's negligence caused an automobile accident; that D1 brought a timely counterclaim against C alleging that C's negligence caused the accident; that C and D1 believe that D2's negligence at least contributed to the accident; and that both C and D1 wish to add two claims against D2. Each has a claim for damages based on the injury which he sustained in the accident, and each may have a claim for contribution from D2 should either C or D1 be held liable to the other.

5.44 We will begin with the claims against D2 for damages. It is possible that the discovery period had expired against D1's claim because D1 acquired the requisite knowledge as to D2's possible liability through investigations made shortly after the accident, long before C began the proceeding, but that the discovery period had not expired against C's claim. If D2 were negligent, C could obtain a judgment against D2, but D2 would have a limitations defence against D1's claim. It is also possible that D2 received the sufficient knowledge as to D1's claim required by the knowledge to avoid prejudice requirement during D1's earlier investigation. If so, D2 would lose his limitations defence under the exception provision.

5.45 A claim for contribution, being a creature of statute, poses unique problems. In paragraph 2.210 we recommended that the ultimate limitation period for such a claim should begin when the claimant for contribution (here C or D1) was made a defendant under a claim (that of the other) seeking to impose a liability upon which a claim for contribution (a claim against D2) could be based. Under our recommendation, the discovery limitation period for a claim cannot begin until the claimant knew, or ought to have known, that the injury for which he claims a remedial order had occurred. Until either C or D1 is held liable to the other, D2 could have no duty of contribution, and hence neither C nor D1 could be injured by a failure of D2 to contribute to satisfy the liability. For example, although D1 could anticipate injury if D2 failed to contribute to satisfy a liability which might be imposed on D1, D1 could not know of his injury until it occurred when liability was imposed on him and D2 failed to contribute to satisfy it. If D1 knew that D2's negligence contributed to the accident before liability to C was imposed on D1, the discovery period for D1's claim for contribution from D2 would probably begin when the liability to C was imposed on D1. Otherwise, the discovery period for the claim for contribution could not begin until D1 discovered, or ought to have discovered, D2's negligence, and that could be some time after liability to C was imposed on D1. In short, the discovery period for a claim for contribution will not begin until a liability is imposed on the claimant and until he also knows that there is a defendant who might be liable to contribute. Once a claimant for contribution knows these facts, he will almost certainly bring a claim within the two-year discovery period. We believe, therefore, that in practice the exception provision will be relevant to a claim for contribution only when the applicable limitation period is the ultimate period.

(c) Protective requirements

5.46 When an added claim results from a change with respect to the defendant, the added claim must satisfy (1) the relationship requirement and (2) the knowledge to avoid prejudice requirement.

(i) Relationship requirement

5.47 The only protective function the relationship requirement will perform is to restrict the scope of the exception provision. Unless the added claim satisfies the relationship requirement, the exception provision will not be applicable at all, and the defendant will retain his limitations defence to the added claim. But, if the exception provision is applicable, the relationship requirement will not provide the defendant with any substantive limitations protection.

5.48 It is otherwise when the added claim does *not* result from a change with respect to the defendant. In this situation the defendant will already be a party to the action under a timely claim and he will know of the conduct, transaction or events described in the original pleading in the action. Although a claim may be added against him after the expiration of the limitation period applicable to the added claim, the defendant should not be vulnerable to surprise because the added claim must not introduce matters which are unrelated to the conduct, transaction or events the defendant will have knowledge of. The exception provision we are concerned with now will apply when the added claim makes a change with respect to the defendant. The claim may add a defendant to the action after the expiration of the limitation period applicable to the claim, and we cannot assume that the added defendant will have previously received any information about the action.

(ii) Knowledge to avoid prejudice requirement

5.49 The knowledge to avoid prejudice requirement must be relied on to give a defendant substantive limitations protection. Under this requirement, a defendant must have received sufficient knowledge of the added claim that he will not be prejudiced in maintaining a defence to it on the merits, and he must have acquired this knowledge within the limitation period applicable to the added claim plus the time provided by law for the service of process, which means that he must have acquired this knowledge no later than he might have acquired it had the added claim been filed timely and had he been served at the latest time permitted by law.

5.50 In our view a credible argument can be made that this requirement will satisfy the evidentiary reasons which demand a limitations system. If a potential defendant has received sufficient knowledge of a potential claim that he will not be prejudiced in maintaining a defence to it on the merits, it is not unreasonable to expect him to recognize that he is vulnerable to the potential claim, that it may be brought after the expiration of the limitation period applicable to it in a proceeding previously commenced, and that he should gather and preserve the evidence necessary for a defence to it on the merits.

5.51 However, we do not believe that the knowledge to avoid prejudice requirement will satisfy either the economic reasons for a limitations system or those based on peace and repose. Insofar as protection for defendants is concerned, the central element in the limitations system we recommend is the ultimate limitation period. Under the exception provision we are considering, a defendant may be brought into a proceeding previously commenced under a claim added after the expiration of the limitation period applicable to the claim, and the applicable period can be the ultimate period. Until the termination of the proceeding previously commenced, a potential defendant will be vulnerable to being drawn into it, he will enjoy neither peace nor repose, his economic mobility will be threatened by a potential liability of uncertain magnitude, he will have to continue protective insurance and he will have to retain his defensive evidence. A potential defendant will not be secure until the proceeding previously commenced has been terminated. Because of the knowledge to avoid prejudice requirement, in all probability a potential defendant will have knowledge of the proceeding into which he might be drawn, and he will be able to monitor its progress. But this is not necessarily so.

(d) Minority position

5.52 A majority of us support an exception provision when an added claim makes a change with respect to the defendant, but a minority of us oppose it. The reasons for the minority position have been stated, and can be summarized. If a claim misnamed the proper defendant, the misnomer doctrine will apply, an amendment will not create a new claim, and an exception provision will not be relevant (see paragraph 5.40). If a claim described the wrong defendant by mistake, the new claim which results from an amendment will usually be added within the discovery period, and the exception provision will not be applicable (see paragraph 5.42). The exception provision will permit a defendant to be brought into a proceeding under a claim added after the expiration of the limitation period applicable to the added claim. Assume it is the discovery period which is applicable. The discovery period will not expire until two years after the claimant knew, or ought to have known, specified facts, one of which is the identity of the defendant. In the minority view, the discovery rule accords ample justice to claimants, and an exception provision permitting a defendant to be added to a proceeding by a claim brought after the expiration of the discovery period is unfair to defendants. Assume it is the ultimate period which is applicable. Insofar as protection of defendants is concerned, this limitation period is the vital element in the new Alberta Act. In the minority view, the knowledge to avoid prejudice requirement cannot be relied on to satisfy the evidentiary reasons for a limitations system (see paragraph 5.50), and it does not even purport to satisfy the reasons for a limitations system based on economics or peace and repose (see paragraph 5.51). In the minority view, this exception provision undermines the integrity of the ultimate period to an unacceptable degree.

(5) Burden of proof

5.53 If an exception provision is applicable, it will eliminate a limitations defence to an added claim which a defendant would otherwise have. In theory, therefore, the claimant should have the burden of proving that his claim satisfies all of the requirements of the relevant exception provision. There are no practical difficulties with this theory insofar as two requirements are concerned. We think that the claimant can and should carry the burden of proving (1) that his claim is related to the conduct, transaction or events described in the original pleading in the proceeding and (2) that the enforcement of original claims requirement, if in issue, has been satisfied.

5.54 However, we think that the defendant will be in the best position to prove the facts which establish when he received sufficient knowledge of an added claim that he will not be prejudiced in maintaining a defence to it on the merits, and that he should carry the burden of proving that he did not receive this knowledge during the period allowed by an exception provision if this requirement is in issue.

Recommendation 25

We recommend that the new Alberta Act provide that:

(1) Notwithstanding the expiration of the relevant limitation period, when a claim is added to a proceeding previously commenced, either through new pleadings or an amendment

to pleadings, the defendant is not entitled to immunity from liability under the added claim if the requirements of either subsection (2), (3) or (4) are satisfied.

(2) When the added claim does not add or substitute a claimant or a defendant, or change the capacity in which a claimant sues or a defendant is sued, the added claim must be related to the conduct, transaction or events described in the original pleading in the proceeding.

(3) When the added claim adds or substitutes a claimant, or changes the capacity in which a claimant sues,

(a) the added claim must be related to the conduct, transaction or events described in the original pleading in the proceeding,

(b) the defendant must have received, within the limitation period applicable to the added claim plus the time provided by law for the service of process, sufficient knowledge of the added claim that he will not be prejudiced in maintaining a defence to it on the merits, and

(c) the court must be satisfied that the added claim is necessary or desirable to ensure the effective enforcement of the claims originally asserted or intended to be asserted in the proceeding.

(4) When the added claim adds or substitutes a defendant, or changes the capacity in which a defendant is sued, the requirements of clauses (3)(a) and (b) must be satisfied.

(5) Under this section,

(a) if the defendant pleads this Act as a defence, the claimant has the burden or proving

(i) that the added claim is related to the conduct, transaction or events described in the original pleading in the proceeding, and

(ii) that the requirement of clause (3)(c), if in issue, has been satisfied, and,

(b) the defendant has the burden of proving that the requirement of clause (3)(b), if in issue, was not satisfied.

[The minority would have Recommendation 25 read as follows:

'We recommend that the new Alberta Act provide that:

(1) When a proceeding has been commenced, this Act does not apply to proceedings by counterclaim with respect to any claims related to the conduct, transaction or events described in the original proceeding.

(2) For the purpose of this Act, a defendant serving a third party notice shall be deemed to have discovered his claim against the third party at the time that the defendant was served in the proceeding to which the third party notice relates, and the ultimate limitation period applicable to the third party notice shall be extended by the time provided by law for service of the third party notice.

(3) Nothing in this Act precludes the amendment of a claim against the defendant so long as the amendment is related to the conduct, transaction or events described in the claim.']

CHAPTER 6. PERSONS UNDER DISABILITY

6.1 Limitations statutes conventionally contain special provisions for persons under disability. The reasons for this can be best discussed when we consider the question of what persons a jurisdiction should treat as under disability.

A. Persons under Disability

6.2 In Alberta a minor is a person under 18 years of age. Such persons are treated as under disability under clause 1(c) of the present Alberta Act and we do not believe that this policy should be altered.

6.3 Any problems that exist arise in connection with an adult. Under clause 1(c) of the present Alberta Act disability may arise from "unsoundness of mind". However, the Act contains no more specific definition as to the meaning of this phrase. Under section 25 of the Dependant Adults Act[57], a trustee may be appointed for an adult who is "unable to make reasonable judgments in respect of matters relating to all or any part of his estate". The objective of a limitations act is to limit the time available to a claimant to bring a claim. The discovery limitation period we have recommended will give a claimant two years from the time that he obtained the requisite knowledge to conduct further investigations, to attempt to negotiate a settlement, and to bring a claim if necessary. This recommendation assumes that a person who obtains the requisite knowledge has the ability to make reasonable judgments in matters relating to his estate, and that clearly includes decisions relating to a claim. We believe that the definition we have quoted from the Dependant Adults Act focuses precisely on the group of adults for whom special provision should be made in the new Alberta Act: those adults who are unable to make reasonable business judgments. We note that this definition states the reason which supports the public policy for treating minors as persons under disability, for they are presumed to be unable to make reasonable judgments. We will recommend that the definition in the Dependant Adults Act be adopted in the new Alberta Act to define an adult under disability.

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[57] R.S.A. 1980, c. D-32.

6.4 Not only do we find the definition in the Dependant Adults Act appropriate today; we have an additional reason for favoring a linkage with that Act. We could recommend that the new Alberta Act incorporate an independant definition of an adult under disability. Developing such a definition would require the resolution of difficult issues, and any definition developed would have to be reviewed from time to time in the light of revised social and medical standards. We prefer to accept the premise that, as the maintenance of an appropriate definition for an adult under disability is a primary objective of the Dependant Adults Act, the definition used in that Act should be adopted in the new Alberta Act.

6.5 Our recommendation will not require that a trusteeship order have been made under the Dependant Adults Act; it will suffice if an order could have been made. There is a practical reason for this. A decision to apply for a trusteeship order usually depends on delicate and difficult family considerations, involving social, economic and psychological factors. Frequently an order is not sought even though it could readily be obtained. Rather, the family handles the financial affairs of the person in fact under disability in private and informal ways. The Dependant Adults Act is often the last resort. Hence our recommendation adopts the standard, but not the procedure, of that Act.

> Recommendation 26
>
> We recommend that the new Alberta Act provide that: "person under disability" means
>
> (a) a minor, or
>
> (b) an adult for whom a trusteeship order could be made under the provisions of the Dependant Adults Act.

B. Suspension of Limitation Periods

(1) The Present Alberta Act

6.6 Section 8 of the present Alberta Act, which applies to most claims under Part 1 of the Act, provides that if a person is under disability when his cause of action arises, a situation often described as "prior disability", he may bring an action either within the applicable limitation period or within two years after he ceased to be under disability. Section 59 achieves the same result, but does not refer to the applicable limitation period because it applies only to claims under Part 9 for which the applicable limitation period is two years. Section 46 applies to the claims under Parts 2-5. It provides that if a person was under disability when his cause of action accrued, then the cause of action is deemed to have accrued when he ceased to be under disability or died, whichever happened first. Thus, under sections 8 and 59, the person under disability will always have at least two years from the time of his recovery in which to bring an action, and under section 46 he will have the full applicable limitation period.

6.7 We believe that there is a problem under the present Alberta Act. The sections summarized above all make special provisions for a person with a prior disability, that is, one who was under disability when his claim arose. No special provisions are made for a person who came under disability after his claim arose, a situation often described as "subsequent disability". This situation could even exist for a minor, for although he will be under disability from birth to age 18, he could be the successor owner of a claim which arose before his birth. If a claim arose in favor of an adult shortly before he came under disability, as a practical matter it is unlikely that he would have the capacity to make prompt and reasonable judgments with respect to the claim before his disability. Nevertheless, under the present Alberta Act the operation of the limitation period will not be suspended in this situation. We do not think that this is a just solution.

(2) Discovery limitation period

6.8 The discovery period we recommend gives a claimant two years from the time he obtains the requisite knowledge to conduct further investigations, to negotiate a settlement, or to bring an action. An adult under disability might well obtain the requisite knowledge shortly before he came under disability, and either he or a minor might obtain it while under disability. However, neither a minor nor an adult under disability is deemed able to make reasonable judgments in respect of matters relating to his estate, and that surely applies to decisions relating to a claim. We believe that the operation of the discovery period should be suspended while the claimant is a person under disability.

6.9 Little comment is required as to the effect of this suspension on the claim of a minor which would otherwise be subject to the discovery period. A minor would be under disability whenever he obtained the requisite knowledge, the discovery period would be suspended until he reached age 18, and hence it could not possibly expire before he reached age 20.

6.10 If an adult obtained the requisite knowledge while he was under disability, the discovery period would be suspended from the moment when it could have become operative and would remain suspended until the disability ceased. The adult claimant would then have a full two years in which to bring an action. Assume, however, that an adult obtained the requisite knowledge one year before he came under disability. One year of the discovery period would have run before the disability began, and the period would expire one year later during the disability unless it were suspended. During the first year, on the threshold of his disability, the claimant would probably be relatively unable to make reasonable business judgments, and after the disability commenced he would be unable to make these judgments by definition. The suspension we will recommend will give the claimant one year after his recovery in which to bring an action in this example.

(3) Ultimate limitation period

(a) Basic suspension rule

6.11 The ten-year ultimate period we recommend will usually begin to operate against a claimant when the claim arose. This period is designed to benefit defendants and reflects a value judgment that, if the objectives of a limitations system are to be achieved, a defendant should be entitled to assert his immunity from liability under a claim at the expiration of this period whether or not the claimant discovered the requisite knowledge during this period, and, indeed, whether or not he even ought to have discovered it.

6.12 The initial question is, if the ultimate period operates against a claimant even if he could not, after reasonable investigation, discover the requisite knowledge about his claim, why should the operation of this period be suspended for a person under disability? The answer to this question is that the situation of a person not under disability is significantly different from that of a person under disability. A person not under disability is considered able to manage his financial affairs. Whether or not it could be said that he ought to have discovered the requisite knowledge about his claim, through the exercise of a greater than normal diligence he might have obtained this knowledge before the ultimate period expired. The crucial point is that while the person not under disability is able to make investigations and reasonable decisions, a person under disability is deemed not to have this capacity, no matter how much knowledge he may have obtained. Hence we believe that the ultimate period should be suspended while a claimant is a person under disability, but subject to a maximum suspension we will now discuss.

(b) Maximum suspension

6.13 We believe that a fair compromise must be made between the interests of claimants under disability and potential defendants. We reemphasize that all members of society are potential defendants, that a potential defendant will frequently not know of a claim against him, and will frequently not know that even a known claimant is a person under disability. A limitations system, like a chain, is as strong as its weakest link. Suspension provisions, which are often called "tolling provisions", are acknowledged to be the weak links in a limitations system. Because a defendant can never know that there is not an outstanding claim against him in favor of a person under disability, a defendant cannot, as a practical matter, derive the full benefits of a limitations system until he is assured of a defence to claims held by persons under disability. Under our recommendations it is the discovery limitation period which will give a defendant a limitations defence in most cases. The ultimate period will give a defendant a limitations defence to a stale claim in a relatively small group of cases. We believe that the maximum suspension of this period should be ten years. Even with this suspension, a defendant will not enjoy repose, and he will not be able to destroy his defensive records, until 20 years after a claim against him arose.

(c) Operation of ultimate limitation period

6.14 The primary reason for our recommendation to impose a ten-year maximum suspension of the ultimate period is to insure that this period will never expire against a claimant before he reaches age 20. A claimant will always have at least two years after reaching majority in which to bring an action. (1) Assume that a minor suffered harm at birth because of medical malpractice. The ultimate period would be suspended for the maximum ten years because the claimant was a minor, and would then operate for the normal ten years, expiring when the claimant reached age 20. (2) Assume that a minor suffered harm at age ten. The ultimate period would be suspended for eight years, until the minor reached majority, and would then operate for the normal ten years, until the claimant was 28 years old. However, it is most likely that the discovery limitation period would become operative much sooner than this, probably when the minor reached majority, in which case the defendant would gain a limitations defence under the discovery period when the claimant reached age 20.

6.15 Two examples are used to demonstrate the operation of the ultimate period, with suspensions, for an adult under disability. (1) Assume that the claim arose five years before the adult came under disability, and that the disability lasted for five years. The ultimate period would operate against the adult for five years, it would then be suspended during the five years of disability, and it would then operate for the remaining five years of the ten-year period. (2) Assume that the claim arose while the adult was under disability, and that the disability continued for 25 years. The ultimate period would be suspended for the maximum ten years, and would then operate against the adult for the normal ten years. The limitations defence would thus become available five years before the adult recovered from the disability.

(4) Represented person

6.16 Section 59 of the present Alberta Act contains special provisions with respect to tort actions. It provides:

> 59(1) When a person entitled to bring an action to which this Part applies is under disability at the time the cause of action arises, he may commence the action at any time within 2 years from the date he ceases to be under disability.
>
> (2) Subsection (1) does not apply
>
> (a) if the person under disability is a minor in the actual custody of a parent or guardian, or
>
> (b) if the person under disability is a person in respect of whom
>
> (i) a committee is appointed under *The Mentally Incapacitated Persons Act*, or
>
> (ii) a guardianship order under the *Dependent Adults Act* is in effect and the guardianship order
>
> (A) appoints a plenary guardian in respect of the person under disability, or
>
> (B) appoints a partial guardian who has capacity to commence an action.

It can be seen that in the situations covered by subsection (2), the applicable limitation period will operate as though the person were not under disability. If we agreed with the policy reflected by subsection (2), we would not restrict its application to tort claims. However, we do not agree with this policy. Our reason is simple enough. We are familiar with too many cases in which a parent, a committee, or a guardian, as the case may be, has permitted a limitation period to expire without bringing a claim, to the serious prejudice of a person under disability. Hence we will not recommend that any provisions analogous to subsection (2) be included in the new Alberta Act.

C. Burden of Proof

6.17 We believe that the claimant should have the burden of proving that the operation of the limitation periods provided by the new Alberta Act was suspended. Our reason is that because the claimant will be in possession of the factual information required to prove that he was under disability, he should carry the burden of proof on this issue.

Recommendation 27

We recommend that the new Alberta Act provide that:

(1) Subject to subsection (2), the operation of the limitation periods provided by this Act is suspended during any period of time that the claimant was a person under disability.

(2) The operation of the ultimate limitation period cannot be suspended under subsection (1) for a total period of time in excess of ten years.

(3) Under this section, if the defendant pleads this Act as a defence, the claimant has the burden of proving that the operation of the limitation periods provided by this Act was suspended.

CHAPTER 7. CONCEALMENT

A. Policy Issue

7.1 In this chapter we are required to revisit the classic dilemma of limitations law. The objective of a limitations system is to give a claimant a reasonable period of time, and no more than that, in which to bring a claim. We discussed the policy reasons for a limitations system at considerable length in Chapter 1. Although protection of potential defendants is probably the primary goal of a limitations system, there are also broad societal reasons for maintaining the integrity of such a system. If, in a given case, we are willing to stipulate that a defendant fraudulently (that is, knowingly and wilfully) concealed facts material to a claim against him, we are not likely to conclude that he should nevertheless be entitled to a limitations defence to the claim. If a limitations act contains a provision depriving a defendant of a limitations defence if he has fraudulently concealed facts material to a claim, and if the limitation period applicable to that claim has expired, the claimant will have a powerful incentive to allege that facts material to his claim were fraudulently concealed by the defendant. An allegation of fraudulent concealment carries no evidential weight. The allegation may be either spurious or well founded, and we have no rational grounds for making an assumption either way. In terms of the reasons for a limitations system, the defendant will be no less vulnerable to an allegation of fraudulent concealment of facts than he will be to an allegation of facts which, if true, would constitute the breach of a duty owed to the claimant. Indeed, because of the persistence of the fallacy of the meritorious claimant, coupled with the emotional response a claim of fraud often produces, the defendant may be more vulnerable. In short, the reasons for a limitations system, if sound, should not be rejected because of a claimant's allegation of fraudulent concealment.

7.2 This problem will not exist with respect to the discovery limitation period we have recommended. That period will not begin to operate until the claimant either acquired, or ought to have acquired, the requisite knowledge. If neither element of this rule applies, the period will not become operative, and neither element will apply if material facts were concealed. It is quite irrelevant whether the fact that the claimant suffered harm, or the fact that the harm was to some degree attributable to conduct of the defendant, was concealed by accident or fraud. The discovery period will not begin to operate if the concealment were either accidental or fraudulent.

7.3 The problem will exist with respect to the ultimate limitation period we have recommended. The issue is, should this period be suspended at all if the claimant can prove that facts material to his claim were fraudulently concealed by the defendant, and if so, should there be a maximum period for the suspension?

B. Provisions in Current Acts

7.4 The present Alberta Act contains three relevant sections, applying to different parts of the Act, as follows: section 6 applies to Parts 1 and 2, section 31 applies to Part 3, and section 57 applies to Part 9. Section 6, which is identical in substance to section 57, provides:

> 6 When the existence of a cause of action has been concealed by the fraud of the person setting up this Part or Part 2 as a defence, the cause of action shall be deemed to have arisen when the fraud was first known or discovered.

Section 31 differs, insofar as is relevant here, only in that it incorporates a constructive knowledge element: the cause of action shall be deemed to have arisen when it was or with reasonable diligence might have been first known or discovered. In effect, all three of these sections suspend the operation of the applicable limitation period until the time of discovery. Because there is no ultimate limitation period in the Act, a defendant can never be certain that he will be entitled to a limitations defence to a claim. Because a defendant will always be subject to an allegation of fraudulent concealment, defendants in some vulnerable categories would be well advised to retain defensive files for an indefinite period of time.

7.5 Clause 6(3)(e) of the B.C. Act applies a discovery rule to any action if material facts relating to the cause of action have been wilfully concealed. This provision will produce essentially the same result as the discovery limitation period we have recommended; the limitation period will not begin to operate until the time of discovery. Under subsection 6(5) of the B.C. Act, the claimant has the burden of proving the wilful concealment. However, section 8 of the B.C. Act contains two ultimate limitation periods which are not subject to a suspension provision for fraudulent concealment. The general ultimate period is 30 years, and a special ultimate period of six years applies to negligence actions against hospitals, hospital employees and medical practitioners.

7.6 Insofar as is relevant to the concealment issue, the 1982 Uniform Act uses the same strategy as does the B.C. Act. Under subsections 13(1) and (2), the limitation period will not begin to operate until the time of discovery. Subsection 13(4) imposes the burden of proving concealment on the claimant. The very significant difference concerns the ultimate limitation period. Under subsection 13(3), this period expires ten years after the date of the act or omission on which the action is based, and it is not subject to a suspension provision for fraudulent concealment.

C. Options and Recommendation

7.7 We believe that there are only three viable options. First, we could recommend that no provision be included in the new Alberta Act permitting the suspension of the ultimate period on the grounds of fraudulent concealment. This would fully maintain the integrity of the Act, and is the solution adopted by both the B.C. Act and the 1982 Uniform Act.

7.8 Secondly, we could recommend a provision permitting the suspension of the ultimate period, but subject to a maximum period of suspension. Ten years would be an appropriate maximum period, for the net result would then be consistent with our recommendation in Chapter 6 (see paragraph 6.13) with respect to suspension for a person under disability. The ultimate period could be suspended for a maximum period of ten years on the grounds of fraudulent concealment, and it would then operate for the normal ten years. In neither a disability nor a concealment situation could the eventual ultimate period exceed 20 years.

7.9 Thirdly, we could recommend a provision permitting the suspension of the ultimate period indefinitely on the grounds of fraudulent concealment.

7.10 The normal standard of proof in civil litigation is proof by a preponderance of the evidence. A claimant must submit evidence which, if believed, would prove the facts essential to his case. Beyond that, the claimant need only submit better evidence than the defendant. However, there is considerable case law supporting the proposition that fraud must be established by more than a mere preponderance of the evidence, and often by clear and convincing evidence. Under either option (2) or (3), we believe that a court would require that the claimant prove fraudulent concealment by more than a mere preponderance of the evidence, and that this practice will give substantial protection to defendants. We will recommend option (3).

7.11 Any suspension of the ultimate period on the grounds of fraudulent concealment will undermine the overall effectiveness of the limitations system as a measure to protect defendants from spurious claims. For this reason, we will recommend that the burden of proving fraudulent concealment be imposed on the claimant.

Recommendation 28

We recommend that the new Alberta Act provide that:

(1) The operation of the ultimate limitation period is suspended during any period of time that the defendant knowingly and wilfully concealed the fact

(a) that the injury for which a

remedial order is claimed had occurred,

(b) that the injury was to some degree attributable to his conduct, or

(c) that the injury, assuming liability on his part, was sufficiently serious to have warranted the claimant's bringing an action.

(2) Under this section, if the defendant pleads this Act as a defence, the claimant has the burden of proving that the operation of the ultimate limitation period was suspended.

CHAPTER 8. AGREEMENT; ACKNOWLEDGMENT AND PART PAYMENT

8.1 Because agreements, acknowledgments and part payments are all actions of persons which may alter the normal operation of a limitations system, we will consider all of these subjects in this chapter.

A. Agreements

8.2 Potential parties to an action may make an agreement reducing an applicable limitation period for the benefit of the potential defendant, or extending an applicable limitation period for the benefit of the potential claimant. Professor Williams states that it is not completely clear that the courts have been willing to enforce these agreements as the same result could usually be reached in any given case on the grounds of estoppel based on inducement and detrimental reliance.[58] However, he states that this should not make any difference.[59] We agree with Professor Williams and believe that these agreements should be enforceable.

8.3 It is quite clear that a limitations system provides a defendant with an optional defence to a claim not brought within an applicable limitation period which he may or may not assert at his discretion. If the defendant does not avail himself of a limitations defence to which he is entitled, the court will retain its power to dispose of the claim on its merits and to impose an appropriate liability on the defendant. If a defendant can waive a limitations defence by not asserting it, we can see no reason why he and a claimant should not be permitted to make a binding agreement extending an otherwise applicable limitation period. The effect of such an agreement may be to relieve the claimant from the necessity of bringing an action which, in the course of events, may prove to be unnecessary. It will frequently be mutually advantageous to the parties if more time is available for settement negotiations or if the defendant is granted additional time to perform his obligations, with litigation expenses postponed until they become essential. For these reasons, we believe that agreements extending limitation periods for the convenience of the parties should be encouraged.

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[58] J. Williams, *Limitation of Actions in Canada* (2nd ed. 1980) 20.

[59] *Id.* at 22.

8.4 It may be argued, however, that agreements reducing an otherwise applicable limitation period are subject to different considerations. Although an agreement extending a limitation period will usually be made after an alleged breach of duty has occurred, an agreement reducing a limitation period will usually be made before a contemplated transaction, which may result in a breach of duty, has taken place. For example, persons supplying goods or services, such as building contractors or medical doctors, might refuse to enter into a transaction without an agreement providing for a shorter limitation period than provided by statute. We do not believe that this has created problems. Moreover, we think that the courts can be relied upon to utilize contractual doctrines proscribing the enforcement of contracts which are unconscionable or otherwise contrary to public policy in appropriate cases.

8.5 On balance, we believe that persons should be permitted to make agreements respecting limitation provisions applicable to their actual or potential legal controversies, and that because of the present ambiguity as to the enforceability of these agreements, the new Alberta Act should contain an express provision sanctioning them within the framework of accepted contractual doctrines.

B. Acknowledgment and Part Payment

8.6 Although the doctrines of acknowledgment and part payment are of judicial origin, the basic rules of law governing these subjects have been codified in most common law jurisdictions, and the provisions in the present Alberta Act are representative.

(1) Acknowledgment

(a) Unsecured debts

8.7 Because acknowledgments are probably most frequently encountered in connection with unsecured debts and other liquidated pecuniary claims, we will discuss them in this context first. At common law, if a debtor acknowledged a debt, the claim based on the debt was deemed to have reaccrued on the date of the acknowledgment.[60] Thus the limitation period applicable to the claim began to operate anew from the date of the acknowledgment, not because of any express statutory mandate, but because of the fresh accrual of the claim. Under subsection 9(1) of the present Alberta Act, the same result is achieved by an express statutory provision; if a person acknowledges a debt, a new six-year limitation period begins from the date of the acknowledgment.

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[60] 28 *Halsbury's Laws of England* (4th ed. 1979) para. 878.

8.8 Why, however, should an acknowledgment of a debt result in a reaccrual of the claim at common law and a renewed limitation period under a typical statute? We must ask a further question. What is an acknowledgment of a debt? At common law there were two requirements. (1) There had to be an admission of a debt or other liquidated amount outstanding and unpaid. In this regard, the debt had to be either quantified in figures or capable of ascertainment by calculation without further agreement of the parties.[61] (2) The admission had to contain an express or implied promise to pay the debt.[62] We can derive the policy reasons for the common law doctrine of acknowledgment from these requirements. We think there are two reasons. (1) If a debtor has admitted his indebtedness and his legal duty to pay the debt, he has, by this conduct, renounced his need for the protection afforded by a limitations system. If he has admitted his legal liability, the reasons for limitations protection based on stale evidence, peace and repose, and economic cost are so reduced that a renewed limitation period is justified. (2) The second reason is based on estoppel. If the debtor has promised to pay a debt, the creditor should be permitted to rely on this new promise without bringing an action for a renewed limitation period. We can also explain an inherent constraint on the scope of the acknowledgment doctrine from these requirements. It does not apply to a claim for unliquidated damages, whether based on tort or contract,[63] for until a duty to pay a certain or ascertainable sum has been imposed on a person, he will have no legal duty to admit, much less to promise to perform by payment.

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[61] *Id.*

[62] *Id.* at para. 881.

[63] *Id.* at para. 878.

8.9 Relatively recent statutes have eliminated the second acknowledgment requirement referred to above: the express or implied promise to pay. The present Alberta Act does so in clause 9(2)(a), and the B.C. Act does so in subclause 5(2)(b)(i). Professor Williams provides the following reason for this alteration in the doctrine of acknowledgment.[64]

> There was some considerable difficulty in the attempt to apply this judicial test in that it was difficult to say whether a promise was expressed or implied in any given acknowledgment.

Indeed, clause 9(2)(b) of the present Alberta Act, and subclause 5(2)(b)(ii) of the B.C. Act, both provide that an acknowledgment is effective even if it is accompanied by a refusal to pay. Because of these provisions, the doctrine of acknowledgment cannot be based on estoppel in Alberta and British Columbia. We think, however, that a renewed limitation period remains justified because of the debtor's reduced need for limitations protection when he has admitted his duty to pay a debt. We believe, therefore, that if an obligor of a liquidated pecuniary sum, as a debt or otherwise, admits his duties with respect to the obligation on which the claim is based, the limitation period applicable to the claim should begin anew at the date of the admission.

(b) Secured debts

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[64] J. Williams, *Limitation of Actions in Canada* (2nd ed. 1980) 218.

8.10 If a debt is unsecured, the creditor's claim will be for a personal remedial order directing the debtor to pay the debt. As stated in paragraphs 8.8-9, if the debtor admits his duty to pay the debt, the limitation period applicable to this claim should begin anew at the date of the admission. If a debt is secured, the creditor's claim may be for a remedial order for the collection of the debt through the realization of the security interest in the collateral. If the debtor admits his duty to pay the debt and the creditor's right to collect the debt through the realization of a security interest, we believe that the limitation period applicable to this claim should begin anew at the date of the admission. As in the case of the unsecured obligation, we believe that this rule should extend to a security interest for any obligation with respect to a liquidated pecuniary sum. On this subject, our recommendation will not change the present law in Alberta, for the same result will now be achieved under the following provisions of the present Alberta Act: subsection 35(2) (acknowledgment of mortgage of real or personal property); clause 37(2)(b) (acknowledgment of right of vendor under agreement for sale of land); and clause 39(2)(b) (acknowledgment of right of vendor under conditional sale of goods).

8.11 There is an opposite side to the coin when a debt is secured by a security interest in collateral, for a court has power to grant the debtor a right to pay a debt in default, notwithstanding the security agreement, and hence to redeem the collateral from the security interest. The following provisions of the present Alberta Act provide for a renewed limitation period for a debtor's claim to redeem collateral from a security interest on the grounds of acknowledgment or acceptance of part payment by the creditor: subsections 33(2)-(5) (mortgages of real or personal property); and subsection 36(2) (agreement for sale of land). As we have recommended that the new Alberta Act not apply to a claim requesting a remedial order for the redemption of collateral by a debtor (see paragraphs 3.78-82), neither an acknowledgment nor a part payment provision will be relevant.

(c) Possession of land

8.12 Section 32 of the present Alberta Act provides for a renewed limitation period, on the grounds of acknowledgment, for a claim for possession of land. As we have recommended that the new Alberta Act not apply to a claim requesting a remedial order for the possession of property, whether real or personal (see paragraphs 3.65-73), an acknowledgment provision will not be relevant.

(d) Estate personal property

8.13 Subsection 14(2) of the present Alberta Act provides for a renewed limitation period, on the grounds either of acknowledgment or part performance, for a claim against a personal representative for a share of estate personal property. In our view such a claim would of necessity seek to obtain either (1) a liquidated pecuniary sum, or (2) possession of personal property other than money, or both of the above. In paragraph 8.9 we stated that we believe that the doctrine of acknowledgment should apply to any claim for a liquidated pecuniary sum, as a debt or otherwise. Thus the provision we recommend will cover a claim against a personal representative for such a sum. When we discuss the subject of part payment we will recommend that this doctrine apply to any part payment under a duty to pay a liquidated pecuniary sum, as a debt or otherwise, and this will apply to a claim against a personal representative. We have recommended that the new Alberta Act not apply to a claim requesting a remedial order for the possession of property, whether real or personal (see paragraphs 3.65-73). Hence no acknowledgment provision will be relevant to such a claim against a personal representative.

(2) Part payment

8.14 If an obligor makes a part payment, whether of principal or interest, on a liquidated pecuniary obligation, whether a debt or otherwise, the limitation period applicable to the claim based on the obligation begins anew from the date of the part payment. The doctrine of part payment is codified in the following provisions of the present Alberta Act: subclause 9(1)(b)(iii) (part payment of principal or interest on a debt); clause 14(2)(a) (part payment of a share of estate personal property); clause 15(2)(a) (part payment of arrears of rent or interest on a monetary estate share); subsection 35(1) (part payment of principal or interest on a debt secured by a mortgage of real or personal property); clause 36(2)(a) (part payment of purchase money under an agreement for sale of land, claim by purchaser); clause 37(2)(a) (part payment of purchase money under an agreement for sale of land, claim by vendor); and clause 39(2)(a) (part payment of price or interest under a contract for the conditional sale of goods).

8.15 As with an acknowledgment, the former rule was that a part payment with respect to a simple contract debt did not result in a renewed limitation period unless a new promise to pay the debt could be inferred from the part payment.[65] This requirement is eliminated by clause 9(2)(a) of the present Alberta Act.

8.16 Should the doctrine of part payment be retained, and if so, under what circumstances? A debt will frequently be payable under an amortization schedule in installments over a period of months amounting to several years. Assume that D (the defendant debtor) made his required payments to C (the claimant creditor) for a year; that then, because D was without work and income during a period of recession, D made significantly reduced payments in various amounts for several years; and that D then defaulted completely. But for the doctrine of part payment, it would be necessary for C either to bring an action against D within the limitation period applicable to the first amount of debt in arrears, or to obtain an agreement or an acknowledgment from D within that period. Because of the doctrine, C will have a renewed limitation period from the time of the last part payment, and will be permitted to bring and to maintain an action many years after the limitation period applicable to the first arrears has expired. The limitations system is designed to protect D from the hazards he will sustain if C unduly delays bringing an action. However, it is not designed to force C to bring an action when the circumstances indicate that this is unnecessary, for supporting the judicial system imposes a heavy burden on the public and using it is very expensive for the litigants. If D has made a part payment to C, this will induce C to believe that prompt litigation is not necessary, and it will also support an inference that D does not need the protection of a limitations system until the expiration of a new limitation period.

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[65] 28 *Halsbury's Laws of England* (4th ed. 1979) para. 889.

8.17 It can be seen that the doctrine of part payment is convenient for a creditor, and may not jeopardize a debtor. There is, however, a crucial flaw in the analysis we have so far presented. There is usually written evidence to prove the existence and amount of a debt, and the fact of a part payment. But this is certainly not always the case, and there is no requirement that a part payment be proved by a writing signed by the debtor. Assume that C alleged that D owed him $10,000 and that D made a part payment to him of $1,000; that C brought a claim after the limitation period applicable to the claim would have expired if it were not renewed by the part payment; and that D denies all of C's allegations. But for C's allegation of a part payment, D would be entitled to a limitations defence. If C had alleged an acknowledgment, C would have to prove that D admitted a valid and unpaid debt of $10,000, and as we shall see the acknowledgment would have to be in writing and signed by D or his agent. We can base some confidence on the fact that the acknowledgment must be in writing, and we could infer from the admission of liability that D did not need the protection of a limitations system for a renewed limitation period. Under the part payment doctrine, C will have an opportunity to bring a claim after the expiration of the normally applicable limitation period, and to maintain it with oral evidence of a part payment. In reality, D may have done nothing which could support an inference that he did not need limitations protection. Although we will recommend retention of the part payment doctrine, we will not deny our reservations as to its merit.

8.18 Problems may arise when a debt carries interest, as it usually will. The subject is discussed in *Halsbury's Laws of England*.[66] There it is said that, as principal and interest constitute one demand, it seems that a part payment of principal will give a renewed limitation period for interest then due. Similarly, a part payment of interest will give a renewed limitation period for principal then due, again because a payment of interest is treated as a payment against the principal debt. However, it is also said that a part payment of interest, because it is treated as a payment against principal, will not give a renewed limitation period for interest then due. Indeed, subsection 29(6) of the 1980 English Act expressly states this latter rule: "A payment of a part of the rent or interest due at any time shall not extend the period for claiming the remainder then due. . . ." Because subsection 9(1) of the present Alberta Act provides that "a part payment on account of the principal debt or interest thereon" results in a new limitation period to recover "the debt", this may also be the rule in Alberta. With respect, this rule strikes us as inconsistent with the basic principle that principal and interest constitute one demand. If a part payment of interest is treated as a part payment of principal, and if a part payment of principal gives a renewed limitation period for interest then due, then of necessity a part payment of interest should give a renewed limitation period for interest then due.

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[66] *Id*. at para. 902.

8.19 The B.C. Act appears to provide that a part payment of interest will result in a new limitation period for interest then accrued. Under subsection 5(1), a new limitation period results when a person "confirms the cause of action". Under clause 5(2)(a), a person confirms a cause of action if he (i) acknowledges a cause of action or (ii) makes a payment in respect of a cause of action. Finally, clause 5(2)(c) provides:

> (c) a confirmation of a cause of action to recover interest on principal money operates also as a confirmation of a cause of action to recover the principal money;

8.20 We believe that, whether a liquidated pecuniary obligation consists of a principal debt, rents, income, a share of estate property, or accrued interest on any of the above, a part payment with respect to any part of the entire obligation should result in a renewed limitation period for any accrued obligation.

(3) Confirmation

8.21 As we have explained, although the doctrines of acknowledgment and part payment produce the same result--a renewed limitation period--in other respects they are distinct, and the policy reasons which support them are different. Beginning with the N.S.W. Act (section 54), a trend has developed to define the word "confirmation" to encompass both doctrines. Both the B.C. Act and the 1982 Uniform Act adopt this drafting strategy.

8.22 On balance, we do not favor the introduction of a new word into a field of law which is already extremely complex.

Although the recommendations we will make should clarify and simplify the law of acknowledgment and part payment, they will not result in a complete codification of the two doctrines. The courts will still have to develop specific rules for unique cases. For this reason, we think that a practice of using one word to describe two distinct doctrines will have a tendency to discourage sound analysis.

8.23 Moreover, we do not think that the usage of "confirmation" does clarify and simplify the law. The B.C. Act continues to use acknowledgment and part payment as the operative words with respect to these doctrines. Indeed, in all of the research materials we have studied, the meaning of acknowledgment is communicated through the more commonly understood word "admission". Thus an acknowledgment is an admission by the obligor that a liquidated pecuniary sum is owed and unpaid. The recent statutes which introduce "confirmation" do not do so to replace a word deemed inappropriate; they simply add a new word. All research materials must be stored through index words which facilitate retrieval. We think that a shift from "acknowledgment" and "part payment" to "confirmation" will also confuse this process. We believe that it is easier, and less confusing, for legislation to provide that acknowledgment and part payment both produce the same result, rather than to provide that they both constitute a confirmation which in turn produces a particular result.

(4) Scope of acknowledgment and part payment

8.24 The present Alberta Act contains a separate set of provisions for most of the claims to which the doctrines of acknowledgment and part payment can be applied. Beginning with the specific category or categories of claims, each set of provisions then spells out the requirements of the doctrines in terms of writing requirement, agency, benefit, burden etc. Although this organizational scheme results in highly repetitive provisions, it does define and codify the claims to which the doctrines can be applied. Because characterization and categorization are required, the provisions are frequently difficult to interpret, but at least the Act attempts to establish the scope of the doctrines.

8.25 The B.C. Act and the 1982 Uniform Act both take the same very different approach. Because of the similarity of these two Acts, we will discuss only the B.C. Act. Clause 5(2)(a) provides:

> (2) For the purposes of this section,
>
> (a) a person confirms a cause of action only if he
>
> (i) acknowledges a cause of action, right or title of another; or
>
> (ii) makes a payment in respect of a cause of action, right or title of another;

Literally, this provision would expand the coverage of the doctrines of acknowledgment and part payment to every cause of action recognized under the law. Subsection 5(8) contains a rule as to who will be bound by a confirmation of an action within six different categories of actions listed in clauses (a) through (f), and hence by necessary inference recognizes that these types of actions can be confirmed. Finally, subsection 5(10) provides:

> (10) Except as specifically provided, this section does not operate to make any right, title or cause of action capable of being confirmed which was not capable of being confirmed before July 1, 1975.

The net effect of this approach is to leave the scope of the doctrines of acknowledgment and part payment to be established by the law of British Columbia, by statute or precedent, as it existed before the B.C. Act came into force. We do not favor this approach.

8.26 We believe that the doctrines of acknowledgment and part payment should be applicable to the same claims under the new Alberta Act as they are under the present Alberta Act, if the claim will remain subject to a limitation period under the new Act at all. This objective will be achieved if the doctrines are applicable to any claim for the recovery of a liquidated pecuniary sum, whether secured or unsecured, including a principal debt, rents, income, a share of estate property, or accrued interest on any of the above.

(5) Revival; time for acknowledgment or part payment

8.27 Under subsection 5(1) of the B.C. Act, a confirmation must be made before the expiration of the limitation period applicable to the claim. Under subsection 17(2) of the 1982 Uniform Act, this rule is imposed only when the right on which the claim is based would be extinguished by the Act at the expiration of the limitation period.

8.28 The rule applied by the B.C. Act may be based on the theory that the effect of the expiration of a limitation period is to extinguish the court's power to grant the claimant a judicial remedy to enforce the right on which his claim is based. Framed as a shorthand expression, at the expiration of the applicable limitation period the claim for a remedy is extinguished. We believe that the source of this theory is the unfortunate language which has historically been used in limitations statutes. By custom they provide that an action *must* be brought within and not after the limitation period, and that an action not brought within the limitation period is *barred*. If this language is taken literally, it means that the claim for a remedy is extinguished by the mere expiration of the applicable limitation period. Save for those provisions in a limitations act which provide that a *right* is extinguished at the expiration of an applicable limitation period, we do not think that the extinguishment theory has ever been sound. As we pointed out in paragraph 2.174, the courts have consistently held that a claim for a remedy is not extinguished until a defendant successfully asserts a limitations defence, and by choice or neglect he may not ever assert the available defence. Our Recommendation 1 following paragraph 2.174 reflects an attempt to silence the extinguishment theory.

8.29 The extinguishment theory has led, in turn, to a subsidiary revival theory. If a claim for a remedy is extinguished at the expiration of a limitation period, and if a subsequent acknowledgment or part payment can nevertheless produce a renewed limitation period, these doctrines must have resulted in the revival of an extinguished claim. A jurisdiction might conclude that the revival of an extinguished claim should not be permitted, and hence that neither an acknowledgment nor a part payment made after the expiration of a limitation period should be effective.

8.30 In our view the rule applied by the B.C. Act can be supported by more practical reasons tied to limitations policy. If a defendant has given an acknowledgment or made a part payment, we may infer that he does not need limitations protection for a renewed limitation period. However, the claimant may bring his claim after the expiration of the normal limitation period, and the defendant will have no limitations shield to the claimant's allegation of acknowledgment or part payment. Because there is no writing requirement for proof of a part payment, the defendant will be particularly vulnerable to a part payment allegation. Assume that the applicable limitation period is two years. If the acknowledgment or part payment must occur before the expiration of this limitation period, the claimant will have at most two more years in which to bring his claim, and the defendant will have some limitations protection. However, if the acknowledgment or part payment may be made at any time, the defendant will be vulnerable indefinitely. We believe, therefore, that neither an acknowledgment nor a part payment should be effective unless made before the expiration of the applicable limitation period.

C. Writing Requirement

8.31 Under the present Alberta Act, for every claim to which the doctrine of acknowledgment can be applicable, the acknowledgment must be in writing and signed by the maker. The same rule is provided by subsection 5(5) of the B.C. Act and by subsection 17(6) of the 1982 Uniform Act. We believe that this rule is sound and we will recommend that it be included in the new Alberta Act. As well, we will recommend that an agreement reducing or extending an applicable limitation period must be in writing and signed by the person adversely affected.

8.32 The doctrine of acknowledgment can be quite technical. If a debtor makes a written admission of the facts required to trigger the operation of the doctrine, the creditor will be entitled to a renewed limitation period for his claim. In effect, the limitation period will be extended. Because the doctrine operates through relatively rigid rules of law, it offers the parties little flexibility. A debtor will sometimes make an acknowledgment inadvertently. In this situation flexibility will not be an issue, for neither party will have intended the consequences; the debtor will regret that the creditor has a renewed limitation period, and the creditor will be pleased at his good fortune in obtaining it. Both an acknowledgment and an agreement to extend a limitation period must be in writing and signed by the debtor. If a debtor is willing to incur the consequences of the doctrine of acknowledgment, we think that he would be well advised to avoid the technical requirements and inflexibility of that doctrine, and to make an agreement with his creditor providing directly for the precise limitation results which they desire. In short, in any case in which an acknowledgment would be intentional, we think that an agreement would provide an easier, clearer, and more flexible solution.

8.33 The Law Reform Commission of New South Wales, *First Report on the Limitation of Actions*, (1967), (hereafter the "N.S.W. Report"), recommended that all claims should be capable of acknowledgment,[67] and we gave serious consideration to this proposal. Under our recommendations the limitation period applicable to any claim can be extended by an agreement. Therefore, it is our conclusion that the scope of the technical and inflexible doctrine of acknowledgment should not be expanded.

D. Agency

8.34 Under the present Alberta Act, whenever the doctrines of acknowledgment or part payment can be applicable, an acknowledgment or a part payment made by or to an agent has the same effect as if made by or to the principal. This same rule is contained in subsection 5(9) of the B.C. Act and in subsection 17(10) of the 1982 Uniform Act. We will recommend that this rule be included in the new Alberta Act, and that it also be applicable to an agreement reducing or extending a limitation period.

E. Benefit and Burden

8.35 Assuming that there has been an agreement, an acknowledgment or a part payment, what persons, respectively, should receive the benefit and carry the burden of it? The present Alberta Act does not resolve these questions with general provisions applicable to all claims. Rather, it answers the questions with respect to some claims, and is silent as to others. However, the answers which it does provide are consistent within the Act, and with those in the B.C. Act and in the 1982 Uniform Act. We think, therefore, that the omissions in the present Alberta Act reflect drafting oversights rather than policy choices.

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[67] N.S.W. Report paras. 250-54.

(1) Benefit

8.36 Subsection 5(6) of the B.C. Act provides:

> (6) For the purposes of this section, a person has the benefit of a confirmation only if the confirmation is made to him or to a person through whom he claims, or if made in the course of proceedings or a transaction purporting to be under the *Bankruptcy Act* (Canada).

Subsection 17(7) of the 1982 Uniform Act is identical in substance to the B.C. Act provision. Subsection 54(5) of the N.S.W. Act is identical in substance to the B.C. Act provision, except that it omits any provision for bankruptcy proceedings. Subsection 30(2) of the 1980 English Act is similar, but provides for neither bankruptcy proceedings nor an acknowledgement or payment to a person through whom the claimant claims. From the standpoint of policy, the important feature of all of the above provisions is that, subject to the exception for bankruptcy proceedings in the B.C. Act and the 1982 Uniform Act, they do not permit either an acknowledgement or a part payment to be effective if made to a stranger to the claim.

8.37 We believe that the modern source of this policy position is a report of the Law Revision Committee, *Fifth Interim Report (Statutes of Limitations)*, 1936, (hereafter the "Wright Report"), which contains a relatively thorough discussion of the doctrines of acknowledgment and part payment.[68] Several nineteenth century British statutes contained provisions dealing expressly with the application of these doctrines to narrowly defined categories of claims. With one exception, these statutes all provided that the acknowledgment or part payment had to be made to the claimant or his agent. The exception was a statute dealing with specialty debts. Because this statute was silent as to the person to whom the acknowledgment had to be made, it was held that an acknowledgment of a specialty debt to a third party was effective. No statute dealt with the acknowledgment of a simple contract debt, and that is the situation in which it might occur most often. In this situation the courts held that an acknowledgment would be effective if it contained an express or implied promise to pay the debt, and was made to the creditor or his agent. On the basis of this body of law as it existed in 1936, and in a paragraph dealing with the one case in which an acknowledgment to a stranger would be effective - an acknowledgment of a specialty debt - the Report states:[69]

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[68] Wright Report 22-29.

> It is difficult to find any adequate reason for maintaining this distinction and we think that it should be abolished. We recommend that in no case should an acknowledgment be effective unless given to the other party concerned or his agent.

No further support for the recommendation is provided.

8.38 The Ontario Law Reform Commission expressly agreed with the above recommendation in the Wright Report.[70] Subsection 54(5) of the Bill recommended by the New South Wales Law Reform Commission, which became subsection 54(5) of the N.S.W. Act, is in accord with the recommendation.[71] The Law Reform Commission of British Columbia stated that it was in substantial agreement with the Ontario and New South Wales Commissions on this issue.[72] However, no reasons for its recommendation were given by any of the cited Commissions.

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[69] *Id.* at 24.

[70] Ontario Report 123.

[71] N.S.W. Report 61.

8.39 We believe that there is a sound reason for the policy reflected by subsection 5(6) of the B.C. Act. The doctrines of acknowledgment and part payment are complex, and they often produce difficult litigation. Consequently, although we are willing to recommend that the doctrines be retained, we are not inclined to recommend that they be expanded. We will, therefore, recommend that a provision like subsection 5(6) of the B.C. Act be applicable to the benefit under an agreement, an acknowledgment and a part payment.

(2) Burden

8.40 We do not think that there are any serious policy issues as to who should be bound by an agreement, an acknowledgment or a part payment. Obviously the maker should be bound. As well, we believe that a person should be bound if he is liable under a claim as a successor of the maker. The difficulty, if there is one, is one of drafting. Is this latter statement adequate to define what successors of a maker should be bound?

8.41 With respect to the burden, subsections 5(7) and (8) of the B.C. Act and subsections 17(8) and (9) of the 1982 Uniform Act are virtually identical. We believe that there are two situations in which a person will be liable under a claim as a successor of a predecessor who was liable under the claim. In the first situation a successor may assume the personal liabilities of a predecessor by contract, or, in some cases, those liabilities may be imposed on him by law. For example, it is common for one who buys the assets of a business to assume the liabilities of the business. Clause 5(7)(b) of the B.C. Act provides that a person is bound if "after the making of the confirmation, he becomes, in relation to the cause of action, a successor of the maker". We think that the phrase "in relation to the cause of action, a sucessor of the maker" means liable under a claim as a successor of a predecessor who was liable under the claim.

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[72] B.C. Report 90.

8.42 In the second situation, a person will be liable under a claim as a successor as a matter of law because he has acquired an interest in property from or through a predecessor who was liable under the claim. In this situation the liability is imposed on a person only through the acquired property interest, and not personally. Subsection 5(8) of the B.C. Act states a series of cases in which a person will *probably* be liable under a claim based on his possession of property, and provides that in these cases the successor possessor will be bound by a confirmation by a predecessor possessor. We are troubled by this subsection. It is extremely complex. More important, it does not defer to the general law through a comprehensive statement, such as "whenever a person is liable under a claim because of his possession of property". Rather, it attempts to identify the categories of cases in which the general law will produce this result. The provision may be defective now because it either includes cases in which the general law will not produce this result, or excludes cases in which it will, and even if accurate now, it may become inaccurate as the general law evolves.

8.43 Following the B.C. Act and the 1982 Uniform Act, our recommendation will provide that a person is bound *only* if he is the maker, or if his liability under a claim is derived as a successor from that of a predecessor maker. Hence when joint obligors are severally liable, only the maker will be bound, and not his joint obligors. Sections 10 and 11 of the present Alberta Act now provide specifically for this result, and they include personal representatives as joint obligors. However, under clause 5(7)(c) of the B.C. Act, a trustee will usually be bound by a confirmation made by a co-trustee. We prefer the present Alberta rule.

F. Recommendation

Recommendation 29

We recommend that the new Alberta Act provide that:

(1) The limitation periods provided by this Act may be reduced or extended under an agreement, and may be renewed by an acknowledgment or a part payment, in accordance with this section.

(2) If an agreement provides for the reduction or extension of the limitation period applicable to a claim, the limitation period is altered in accordance with the agreement.

(3) If a person liable under a claim acknowledges the claim, or makes a part payment under the claim, before the expiration of the limitation period applicable to the claim, the operation of the limitation periods begins anew at the time of the acknowledgment or part payment.

(4) A claim may be acknowledged, or a part payment made under it, only if the claim is for the recovery, through the realization of a security interest or otherwise, of an accrued liquidated pecuniary sum, including, but not limited to: a principal debt; rents; income; a share of estate property; and interest on any of the foregoing.

(5) A claim may be acknowledged only by an admission of the person liable under it that the sum claimed is due and unpaid, but an acknowledgment is effective

(a) whether or not a promise to pay can be implied from it, and

(b) whether or not it is accompanied by a refusal to pay.

(6) When a claim is for the recovery of both a primary sum and interest thereon, an acknowledgment of either obligation, or a part payment under either obligation, is an acknowledgment of, or a part payment under, the other obligation.

(7) An agreement and an acknowledgment must be in writing and signed by the person adversely affected.

(8) (a) An agreement made by or with an agent has the same effect as if made by or with the principal, and

(b) an acknowledgment or a part payment made by or to an agent has the same effect as if made by or to the principal.

(9) A person has the benefit of an agreement, an acknowledgment or a part payment only if it is made

(a) with or to him,

(b) with or to a person through whom he claims, or

(c) in the course of proceedings or a transaction purporting to be pursuant to the Bankruptcy Act (Canada).

(10) A person is bound by an agreement, an acknowledgment or a part payment only if

(a) he is a maker of it, or

(b) he is liable under a claim

(i) as a successor of a maker, or

(ii) through the acquisition of an interest in property from or through a maker

who was liable under the claim.

CHAPTER 9. EXTINGUISHMENT OF RIGHT

9.1 Extinguishing rights is not an objective of a limitations system. Rather, its objective is to force the timely litigation of disputes if there is to be litigation. Nevertheless, if, pursuant to a limitations statute, a defendant gains immunity from liability to any remedy which the law provides for the enforcement of the right upon which the claim was based, the right, although not extinguished, will usually have become sterile. Indeed, we believe it is accurate to say that a right without a legal remedy is not a legal right at all. Should rights which have become unenforceable under the legal system be statutorily extinguished?

9.2 This issue is thoroughly discussed in Division A of Chapter VII of the Ontario Report. Rather than repeat this discussion, we will include it as Appendix B of this report. In this respect, we are following a procedure adopted in the B.C. Report. We will also point out that the Ontario Report relied heavily on materials from the N.S.W. Report, which in turn relied on materials from the Wright Report. The discussion in the Ontario Report is based on ten situations, taken from the N.S.W. Report, in which the continued existence of a right, after all enforcement remedies have been barred, has some significance. The B.C. Report, the Ontario Report and the N.S.W. Report all recommend that rights should be extinguished when their enforcement remedies have been barred. The Wright Report declined to make such a recommendation.

9.3 Section 9 of the B.C. Act contains provisions, based on descriptions of categories of actions, which will extinguish most rights after their enforcement remedies have been barred. Section 9 of the 1982 Uniform Act applies extinguishment only to "the right and title of a person to property [real or personal] or to recover money out of property". The only extinguishment provision in the present Alberta Act is section 44. Although otherwise analogous to the 1982 Uniform Act, section 44 applies only to real property.

9.4 All of the ten situations discussed in the Ontario Report involve complex and technical points of law. Moreover, as the Wright Report emphasizes, in most of the situations the cases are rare even in England. We gave serious consideration to recommending a general extinguishment provision along the following lines:

> If a defendant is entitled to immunity from liability under a claim by this Act, the right upon which the claim was based is extinguished to the extent that the remedial order requested was based on that right.

However, there have been exceedingly few cases in Alberta in the ten situations in which an unextinguished right could be significant. Our preference for a provision stating a general principle is based on our belief that, given the infrequency of cases, it would be easier for the courts to work with than would a series of complex provisions geared to specific types of claims. Although section 44, which is a narrow provision, has not created problems, it is the only extinguishment provision in the present Alberta Act. We doubt that a broad extinguishment provision would be very helpful. Indeed, it could create unanticipated problems, although this too is unlikely because the cases are so rare.

9.5 We have decided not to recommend any extinguishment provision. In paragraphs 3.65-73 we recommended that claims, whether legal or equitable, for the possession of property, whether real or personal, be excluded from the coverage of the new Alberta Act, for we wish to eliminate the acquisition of ownership through adverse possession. For this reason a provision analogous to section 44 will no longer be necessary.

9.6 In one of the ten situations, that in which there is a conflict of laws issue, the extent to which a limitations statute extinguishes rights is significant. We discussed this in paragraph 4.6. Assume that Alberta is the forum jurisdiction (that in which a case is brought), and that under accepted conflict of laws rules the case will be decided under the substantive law of Foreign (the foreign jurisdiction). Under current conflict of laws rules, an Alberta court would apply the limitations law of Foreign if that law were classified as substantive, and it would be so classified if it extinguished the right on which the claim was based when the defendant was granted a limitations defence. If the limitations statute of Foreign contained comprehensive extinguishment provisions, that statute would be classified as substantive, and under current conflict of laws rules an Alberta court, as the forum, would apply that statute when deciding a case. In the reverse situation, if Foreign were the forum, a court in Foreign would apply the limitations law of Alberta if it extinguished the right. If all limitations statutes contained a general extinguishment provision, they would all be substantive, and under current conflict of laws principles, whenever a forum court applied the substantive law of a foreign jurisdiction it would apply the limitations law of that jurisdiction as part of its substantive law. The B.C. Report, the Ontario Report and the N.S.W. Report all concluded that this is a desirable result, and that securing it in conflict of laws cases is a principal reason for including comprehensive extinguishment provisions in a limitations act. In Chapter 4 we stated an opposite conclusion. We recommended that Alberta courts apply Alberta limitations law in all conflict of laws cases, irrespective of how the limitations law of a foreign jurisdiction is classified. We would not, therefore, recommend that the new Alberta Act contain a general extinguishment provision in order to secure a result in conflict of laws cases which we do not favor.

9.7 This chapter is concerned with the extinguishment of rights. There are, in truth, two sides to this coin, for to the extent that a legal rule extinguishes the rights of one person it will create rights or privileges for one or more others. Section 50 of the present Alberta Act, which is relevant here, provides:

> 50 No right to the access and use of light or any other easement, right in gross or profit a prendre shall be acquired by a person by prescription, and it shall be deemed that no such right has ever been so acquired.

The doctrine of prescription has its origin in the common law. It is extremely complex, and although it is not properly part of limitations law, it operates in much the same way. We will use a very simple example. Assume that C and D owned, respectively, lot C and adjacent lot D, and that for the prescriptive period of 20 years C used a private road across lot D without either D's consent or opposition. Under the doctrine of prescription, C will have acquired, for the benefit of lot C, an easement across lot D consistent with C's use of lot D. Under this doctrine, D's rights in lot D will have been reduced to the extent necessary to support the privilege of C, and a subsequent owner of lot C, to use the prescriptive easement across lot D.

9.8 Although Alberta received the common law, section 50 provides that it never received the doctrine of prescription insofar as the rights described in that section could have been acquired by prescription. We do not wish to consider this subject, on the merits, in this report, for we believe the issues which would be raised concern substantive property law rather than limitations law.

Recommendation 30

We recommend that section 50 of the present Alberta Act be transferred to the Law of Property Act.

PART III. LIST OF RECOMMENDATIONS

Recommendation 1

After paragraph 2.174

We recommend that the new Alberta Act provide that: if a claim subject to this Act is not brought within the applicable limitation period, the defendant, upon pleading this Act as a defence, is entitled to immunity from liability under the claim.

Recommendation 2

After paragraph 2.184

We recommend that the new Alberta Act provide that: if a claim subject to this Act is not brought within two years after the date on which the claimant first knew, or in his circumstances and with his abilities ought to have known,

(a) that the injury for which he claims a remedial order had occurred,

(b) that the injury was to some degree attributable to conduct of the defendant, and

(c) that the injury, assuming liability on the part of the defendant, was sufficiently serious to have warranted bringing an action,

the defendant, upon pleading this Act as a defence is entitled to immunity from liability under the claim.

Recommendation 3

After paragraph 2.185

We recommend that the new Alberta Act provide that: if the defendant pleads this Act as a defence, the claimant has the burden of proving that his claim was brought within the discovery limitation period.

Recommendation 4

After paragraph 2.193

We recommend that the new Alberta Act provide that: the discovery limitation period begins

(a) against a successor owner of a claim when either a predecessor owner or the successor owner of the claim first acquired or ought to have acquired the requisite knowledge,

(b) against a principal when either

(i) the principal first acquired or ought to have acquired the requisite knowledge, or

(ii) an agent with a duty to communicate the requisite knowledge to the principal first actually acquired that knowledge, and

(c) against a personal representative of a deceased person as a successor owner of a claim, at the earliest of the following times:

(i) when the deceased owner first acquired or ought to have acquired the requisite knowledge, if more than two years before his death,

(ii) when the representative was appointed, if he actually had the requisite knowledge at that time, or

(iii) when the representative first acquired or ought to have acquired the requisite knowledge, if after his appointment.

Recommendation 5

After paragraph 2.198

We recommend that the new Alberta Act provide that: unless a claim subject to this Act is brought within ten years after the claim arose, the defendant, upon pleading this Act as a defence, is entitled to immunity from liability under the claim.

Recommendation 6

After paragraph 2.213

We recommend that the new Alberta Act provide that: for the following claims the ultimate limitation period begins at the times prescribed below:

(a) a claim based on a breach of a duty

of care, when the careless conduct occurred;

(b) any number of claims, based on any number of breaches of duty, resulting from a continuing course of conduct or a series of related acts or omissions, when the conduct terminated or the last act or omission occurred;

(c) a claim based on a demand obligation, when a default in performance occurred after a demand for performance was made;

(d) a claim under the Fatal Accidents Act, when the conduct which caused the death, upon which the claim is based, occurred;

(e) a claim for contribution, when the claimant for contribution was made a defendant under, or incurred a liability through the settlement of, a claim seeking to impose a liability upon which the claim for contribution could be based.

Recommendation 7

After paragraph 2.214

We recommend that the new Alberta Act provide that: the defendant has the burden of proving that a claim was not brought within the ultimate limitation period.

Recommendation 8

After paragraph 2.216

We recommend that the new Alberta Act provide that: nothing in this Act precludes a court from granting a defendant immunity from liability to an equitable remedy, under the equitable doctrines of acquiescence or laches, notwithstanding that the defendant would not be entitled to immunity pursuant to this Act.

Recommendation 9

After paragraph 3.18

We recommend that the new Alberta Act provide that: except as otherwise provided, this Act is applicable to any civil judicial claim requesting a remedial order, including a claim to which this Act can apply arising under any law that is subject to the legislative jurisdiction of the Parliament of Canada, if the claim either

(a) is brought before a court created by the Province, or

(b) arose within the Province and is brought before a court created by the Parliament of Canada.

Recommendation 10

After paragraph 3.22

We recommend that the new Alberta Act provide that: this Act is not applicable to a claim requesting a declaration of rights and duties, legal relations or personal status.

Recommendation 11

After paragraph 3.24

We recommend that the new Alberta Act provide that: this Act is not applicable to a claim requesting the enforcement of a remedial order.

Recommendation 12

After paragraph 3.51

We recommend that rule 331 of the Alberta Rules of Court be deleted.

Recommendation 13

After paragraph 3.51

We recommend that rule 355 of the Alberta Rules of Court be amended to provide that:

(a) Subject to rule 356, an enforcement order may be issued, without leave of the court, at any time within ten years from the date of a judgment or order for the payment of money.

(b) No enforcement order may be issued to enforce any rights under a judgment or order for the payment of money after the expiration of the period specified in subrule (a) unless, before the expiration of this period, the judgment creditor obtains a judgment or order under subrule (c).

(c) The court may [in a proceeding in substance as provided by rule 331] make an order revalidating a judgment or order originally granted, or grant a new judgment or order.

(d) A judgment or order for the payment of money made under subrule (c) is governed by subrules (a) and (b).

(e) The common law action on a judgment is abolished.

Recommendation 14

After paragraph 3.51

We recommend that rule 356 of the Alberta Rules of Court be amended by the deletion of language requiring a judgment creditor to request leave to issue execution because of the lapse of time after the date of a judgment or order.

Recommendation 15

After paragraph 3.61

We recommend that the new Alberta Act provide that: this Act is not applicable to a claim requesting judicial review with respect to the exercise of statutory powers.

Recommendation 16

After paragraph 3.62

We recommend that the new Alberta Act provide that: this Act is not applicable to a claim requesting habeas corpus.

Recommendation 17

After paragraph 3.73

We recommend that the new Alberta Act provide that: this Act is not applicable to a claim requesting a remedial order for the possession of real or personal property.

Recommendation 18

After paragraph 3.77

We recommend that the new Alberta Act

provide that: this Act is not applicable to a claim requesting a remedial order for the realization of a security interest by a secured party in rightful possession of the collateral.

Recommendation 19
After paragraph 3.82

We recommend that the new Alberta Act provide that: this Act is not applicable to a claim requesting a remedial order for the redemption of collateral by a debtor.

Recommendation 20
After paragraph 3.84

We recommend that the new Alberta Act provide that: this Act is not applicable to a claim requesting a remedial order requiring a defendant to comply with a duty based on an easement, a *profit a prendre*, a utility interest, or a restrictive covenant.

Recommendation 21
After paragraph 3.92

We recommend that the new Alberta Act provide that: this Act is not applicable to a claim requesting a remedial order for the revision of a register under the Land Titles Act.

Recommendation 22
After paragraph 3.96

We recommend that the new Alberta Act provide that: the Crown is bound by this Act.

Recommendation 23
After paragraph 3.104

We recommend that the new Alberta Act provide that: this Act is not applicable to a claim which is subject to a limitation provision in any other enactment of the Province.

Recommendation 24
After paragraph 4.22

We recommend that the new Alberta Act provide that: the limitations law of the Province shall be applied to any claim brought in the Province, notwithstanding that, in accordance with the principles of private international law, the claim will be adjudicated under the substantive law of another jurisdiction.

Recommendation 25

After paragraph 5.54

We recommend that the new Alberta Act provide that:

(1) Notwithstanding the expiration of the relevant limitation period, when a claim is added to a proceeding previously commenced, either through new pleadings or an amendment to pleadings, the defendant is not entitled to immunity from liability under the added claim if the requirements of either subsection (2), (3) or (4) are satisfied.

(2) When the added claim does not add or substitute a claimant or a defendant, or change the capacity in which a claimant sues or a defendant is dued, the added claim must be related to the conduct, transaction or events described in the original pleading in the proceeding.

(3) When the added claim adds or substitutes a claimant, or changes the capacity in which a claimant sues,

(a) the added claim must be related to the conduct, transaction or events described in the original pleading in the proceeding,

(b) the defendant must havereceived, within the limitation period applicable to the added claim plus the time provided by law for the service of process, sufficient knowledge of the added claim that he will not be prejudiced in maintaining a defence to it on the merits, and

(c) the court must be satisfied that the added claim is necessary or desirable to ensure the effective enforcement of the claims originally asserted or intended to be asserted in the proceeding.

(4) When the added claim adds or substitutes a defendant, or changes the capacity in which a defendant is sued, the requirements of clauses (3)(a) and (b) must be satisfied.

(5) Under this section,

> (a) if the defendant pleads this Act as a defence, the claimant has the burden or proving
>
> > (i) that the added claim is related to the conduct, transaction or events described in the original pleading in the proceeding, and
> >
> > (ii) that the requirement of clause (3)(c), if in issue, has been satisfied,
>
> and,
>
> (b) the defendant has the burden of proving that the requirement of clause (3)(b), if in issue, was not satisfied.

Recommendation 26

After paragraph 6.5

We recommend that the new Alberta Act provide that: "persons under disability" means

> (a) a minor, or
>
> (b) an adult for whom a trusteeship order could be made under the provisions of the Dependant Adults Act.

Recommendation 27

After paragraph 6.17

We recommend that the new Alberta Act provide that:

> (1) Subject to subsection (2), the operation of the limitation periods provided by this Act is suspended during any period of time that the claimant was a person under disability.
>
> (2) The operation of the ultimate limitation period cannot be suspended under subsection (1) for a total period of time in excess of ten years.

> (3) Under this section, if the defendant pleads this Act as a defence, the claimant has the burden of proving that the operation of the limitation periods provided by this Act was suspended.

Recommendation 28

After paragraph 7.11

We recommend that the new Alberta Act provide that:

(1) The operation of the ultimate limitation period is suspended during any period of time that the defendant knowingly and wilfully concealed the fact

> (a) that the injury for which a remedial order is claimed had occurred,
>
> (b) that the injury was to some degree attributable to his conduct, or
>
> (c) that the injury, assuming liability on his part, was sufficiently serious to have warranted the claimant's bringing an action.

(2) Under this section, if the defendant pleads this Act as a defence, the claimant has the burden of proving that the operation of the ultimate limitation period was suspended.

Recommendation 29

After paragraph 8.43

We recommend that the new Alberta Act provide that:

(1) The limitation periods provided by this Act may be reduced or extended under an agreement, and may be renewed by an acknowledgment or a part payment, in accordance with this section.

(2) If an agreement provides for the reduction or extension of the limitation period applicable to a claim, the limitation period is altered in accordance with the agreement.

(3) If a person liable under a claim acknowledges the claim, or makes a part payment under the claim, before the

expiration of the limitation period applicable to the claim, the operation of the limitation periods begins anew at the time of the acknowledgment or part payment.

(4) A claim may be acknowledged, or a part payment made under it, only if the claim is for the recovery, through the realization of a security interest or otherwise, of an accrued liquidated pecuniary sum, including, but not limited to: a principal debt; rents; income; a share of estate property; and interest on any of the foregoing.

(5) A claim may be acknowledged only by an admission of the person liable under it that the sum claimed is due and unpaid, but an acknowledgment is effective

(a) whether or not a promise to pay can be implied from it, and

(b) whether or not it is accompanied by a refusal to pay.

(6) When a claim is for the recovery of both a primary sum and interest thereon, an acknowledgment of either obligation, or a part payment under either obligation, is an acknowledgment of, or a part payment under, the other obligation.

(7) An agreement and an acknowledgment must be in writing and signed by the person adversely affected.

(8) (a) An agreement made by or with an agent has the same effect as if made by or with the principal, and

(b) an acknowledgment or a part payment made by or to an agent has the same effect as if made by or to the principal.

(9) A person has the benefit of an agreement, an acknowledgment or a part payment only if it is made

(a) with or to him,

(b) with or to a person through whom he claims, or

(c) in the course of proceedings or a transaction purporting to be pursuant to the Bankruptcy Act (Canada).

(10) A person is bound by an agreement, an acknowledgment or a part payment only if

(a) he is a maker of it, or

(b) he is liable under a claim

(i) as a successor of a maker, or

(ii) through the acquisition of an interest in property from or through a maker

who was liable under the claim.

Recommendation 30

After paragraph 9.8

We recommend that section 50 of the present Alberta Act be transferred to the Law of Property Act.

PART IV. DRAFT LIMITATIONS ACT

We have assembled our recommendations into a Draft Limitations Act in order to demonstrate that a limitations statute based on these recommendations could be comprehensive and concise.

We emphasize, however, that this is *not* a Proposed Limitations Act, for two important reasons. (1) Because this is a Report for Discussion, all of our recommendations are merely tentative. It would, therefore, be premature for us to issue a Proposed Act. (2) The Draft Act is merely an assemblage of our recommendations. As these recommendations were neither written nor reviewed by a trained legislative draftsman, it would not be appropriate for us to label a collection of them as a Proposed Act.

In order to give the Draft Act the form of a statute, we have added section 1 (definitions), section 9 (transitional) and section 10 (interpretation). Because the eventual content of these sections will depend to a large extent on the acceptance of our tentative recommendations, we have made no recommendations supporting these three sections.

DRAFT LIMITATIONS ACT

Definitions

1 In this Act,

(a) "claimant" means the person who brings a claim;

(b) "collateral" means property that is subject to a security interest;

(c) "defendant" means the defendant under a claim;

(d) "enforcement order" means an order or writ made by a court for the enforcement of a remedial order;

(e) "injury" means

(i) personal injury,

(ii) property damage,

(iii) economic loss, or

(iv) in the absence of any of the above, the breach of a duty;

(f) "law" means the law in force in the Province, and includes

(i) legislative enactments,

(ii) judicial precedents, both legal and equitable, and

(iii) regulations;

(g) "person under disability" means

(i) a minor, or

(ii) an adult for whom a trusteeship order could be made under the provisions of the Dependent Adults Act;

(h) "remedial order" means a judgment or an order made by a court in a civil proceeding requiring a defendant to comply with a duty or to pay damages for the violation of a right;

(i) "right" means any right under the law and "duty" has a correlative meaning;

(j) "security interest" means an interest in collateral that secures the payment or other performance of an obligation.

Application

2(1) Except as provided in subsection (2), this Act is applicable to any civil judicial claim requesting a remedial order, including a claim to which this Act can apply arising under any law that is subject to the legislative jurisdiction of the Parliament of Canada, if the claim either

(a) is brought before a court created by the Province, or

(b) arose within the Province and is brought before a court created by the Parliament of Canada.

2(2) This Act is not applicable to

(a) a claim requesting a declaration of rights and duties, legal relations or personal status,

(b) a claim requesting the enforcement of a remedial order,

(c) a claim requesting judicial review with respect to the exercise of statutory powers,

(d) a claim requesting habeas corpus,

(e) a claim requesting a remedial order

(i) for the possession of real or personal property,

(ii) for the realization of a security interest by a secured party in rightful possession of the collateral,

(iii) for the redemption of collateral by a debtor,

(iv) requiring a defendant to comply with a duty based on an easement, a *profit a prendre*, a utility interest, or a restrictive covenant,

(v) for the revision of a register under the Land Titles Act, and

(f) a claim which is subject to a limitation provision in any other enactment of the Province.

2(3) The Crown is bound by this Act.

Limitation Periods

3(1) Subject to subsections (2) and (3), if a claim requesting a remedial order is not brought within

(a) two years after the date on which the claimant first knew, or in his circumstances and with his abilities ought to have known,

(i) that the injury for which he claims a remedial order had occurred,

(ii) that the injury was to some degree attributable to conduct of the defendant, and

(iii) that the injury, assuming liability on the part of the defendant, was sufficiently serious to have warranted bringing an action, or

(b) ten years after the claim arose,

whichever period expires first, the defendant, upon pleading this Act as a defence, is entitled to immunity from liability under the claim.

3(2) The limitation period provided by clause (1)(a) begins

(a) against a successor owner of a claim when either a predecessor owner or the successor owner of the claim first acquired or ought to have acquired the knowledge prescribed in clause (1)(a),

(b) against a principal when either

(i) the principal first acquired or ought to have acquired the knowledge prescribed in clause (1)(a), or

(ii) an agent with a duty to communicate the knowledge prescribed in clause (1)(a) to the principal first actually acquired that knowledge, and

(c) against a personal representative of a deceased person as a successor owner of a claim, at the earliest of the following times:

(i) when the deceased owner first acquired or ought to have acquired the knowledge prescribed in clause (1)(a), if more than two years before his death,

(ii) when the representative was appointed, if he had the knowledge prescribed in clause (1)(a) at that time, or

(iii) when the representative first acquired or ought to have acquired the knowledge prescribed in clause (1)(a), if after his appointment.

3(3) For the following claims the limitation period provided by clause (1)(b) begins at the times prescribed in this subsection:

(a) a claim based on a breach of a duty of care, when the careless conduct occurred;

(b) any number of claims, based on any number of breaches of duty, resulting from a continuing course of conduct or a series of related acts or omissions, when the conduct terminated or the last act or omission occurred;

(c) a claim based on a demand obligation, when a default in performance occurred after a demand for performance was made;

(d) a claim under the Fatal Accidents Act, when the conduct which caused the death, upon which the claim is based, occurred;

(e) a claim for contribution, when the claimant for contribution was made a defendant under, or incurred a liability through the settlement of, a claim seeking to impose a liability upon which the claim for contribution could be based.

3(4) Under this section,

(a) if the defendant pleads this Act as a defence, the claimant has the burden of proving that a claim was brought within the limitation period provided by clause (1)(a), and

(b) the defendant has the burden of proving that a claim was not brought within the limitation period provided by clause (1)(b).

3(5) Nothing in this Act precludes a court from granting a defendant immunity from liability to an equitable remedy, under the equitable doctrines of acquiescence or laches, notwithstanding that the defendant would not be entitled to immunity pursuant to this Act.

Conflict of Laws

4 The limitations law of the Province shall be applied to any claim brought in the Province, notwithstanding that, in accordance with the principles of private international law, the claim will be adjudicated under the substantive law of another jurisdiction.

Claims Added to a Proceeding

5(1) Notwithstanding the expiration of the relevant limitation period, when a claim is added to a proceeding previously commenced, either through new pleadings or an amendment to pleadings, the defendant is not entitled to immunity from liability under the added claim if the requirements of either subsection (2), (3) or (4) are satisfied.

(2) When the added claim does not add or substitute a claimant or a defendant, or change the capacity in which a claimant sues or a defendant is sued, the added claim must be related to the conduct, transaction or events described in the original pleading in the proceeding.

(3) When the added claim adds or substitutes a claimant, or changes the capacity in which a claimant sues,

(a) the added claim must be related to the conduct, transaction or events described in the original pleading in the proceeding,

(b) the defendant must have received, within the limitation period applicable to the added claim plus the time provided by law for the service of process, sufficient knowledge of the added claim that he will not be prejudiced in maintaining a defence to it on the merits, and

(c) the court must be satisfied that the added claim is necessary or desirable to ensure the effective enforcement of the claims originally asserted or intended to be asserted in the proceeding.

(4) When the added claim adds or substitutes a defendant, or changes the capacity in which a defendant is sued, the requirements of clauses (3)(a) and (b) must be satisfied.

(5) Under this section,

(a) if the defendant pleads this Act as a defence, the claimant has the burden of proving

(i) that the added claim is related to the conduct, transaction or events described in the original pleading in the proceeding, and

(ii) that the requirement of clause (3)(c), if in issue, has been satisfied,

and,

(b) the defendant has the burden of proving that the requirement of clause (3)(b), if in issue, was not satisfied.

Persons under Disability

6(1) Subject to subsection (2), the operation of the limitation periods provided by this Act is suspended during any period of time that the claimant was a person under disability.

(2) The operation of the limitation period provided by clause 3(1)(b) cannot be suspended under subsection (1) for a total period of time in excess of ten years.

(3) Under this section, if the defendant pleads this Act as a defence, the claimant has the burden of proving that the operation of the limitation periods provided by this Act was suspended.

Concealment

7(1) The operation of the limitation period provided by clause 3(1)(b) is suspended during any period of time that the defendant knowingly and wilfully concealed the fact

(a) that the injury for which a remedial order is claimed had occurred,

(b) that the injury was to some degree attributable to his conduct, or

(c) that the injury, assuming liability on his part, was sufficiently serious to have warranted the claimant's bringing an action.

(2) Under this section, if the defendant pleads this Act as a defence, the claimant has the burden of proving that the operation of the limitation period provided by clause 3(1)(b) was suspended.

Agreement; Acknowledgment and Part Payment

8(1) The limitation periods provided by this Act may be reduced or extended under an agreement, and may be renewed by an acknowledgment or a part payment, in accordance with this section.

(2) If an agreement provides for the reduction or extension of the limitation period applicable to a claim, the limitation period is altered in accordance with the agreement.

(3) If a person liable under a claim acknowledges the claim, or makes a part payment under the claim, before the expiration of the limitation period applicable to the claim, the operation of the limitation periods begins anew at the time of the acknowledgment or part payment.

(4) A claim may be acknowledged, or a part payment made under it, only if the claim is for the recovery, through the realization of a security interest or otherwise, of an accrued liquidated pecuniary sum, including, but not limited to: a principal debt; rents; income; a share of estate property; and interest on any of the foregoing.

(5) A claim may be acknowledged only by an admission of the person liable under it that the sum claimed is due and unpaid, but an acknowledgment is effective

(a) whether or not a promise to pay can be implied from it, and

(b) whether or not it is accompanied by a refusal to pay.

(6) When a claim is for the recovery of both a primary sum and interest thereon, an acknowledgment of either obligation, or a part payment under either obligation, is an acknowledgment of, or a part payment under, the other obligation.

(7) An agreement and an acknowledgment must be in writing and signed by the person adversely affected.

(8) (a) An agreement made by or with an agent

has the same effect as if made by or with the principal, and

(b) an acknowledgment or a part payment made by or to an agent has the same effect as if made by or to the principal.

(9) A person has the benefit of an agreement, an acknowledgment or a part payment only if it is made

(a) with or to him,

(b) with or to a person through whom he claims, or

(c) in the course of proceedings or a transaction purporting to be pursuant to the Bankruptcy Act (Canada).

(10) A person is bound by an agreement, an acknowledgment or a part payment only if

(a) he is a maker of it, or

(b) he is liable under a claim

(i) as a successor of a maker, or

(ii) through the acquisition of an interest in property from or through a maker

who was liable under the claim.

Transitional

9(1) Notwithstanding this Act, if a claim which arose before this Act came into force is commenced in time to satisfy either

(a) the provisions of law governing the commencement of actions which would have been applicable but for this Act, or

(b) the provisions of this Act,

whichever time is later, the defendant is not entitled to immunity from liability under the claim.

(2) Nothing in this Act

(a) deprives a defendant of entitlement to immunity from liability under a claim, or

(b) deprives one of rights in property,

if the entitlement to immunity or the rights in property existed at the time this Act came into force and arose under provisions of law governing the commencement of actions which would have been applicable but for this Act.

Interpretation

10 In ascertaining the meaning of any provision of this Act,

(a) the court may consider Report No. , Limitations, issued by the Institute of Law Research and Reform, in addition to those matters which it could otherwise consider, and

(b) the court shall adopt an interpretation which promotes the general legislative purpose of this Act.

PART V. APPENDICES

APPENDIX A. THE BRITISH COLUMBIA ACT

LIMITATION ACT

CHAPTER 236

Definitions

1. In this Act

"action" includes any proceeding in a court and any exercise of a self help remedy;

"collateral" means land, goods, documents of title, instruments, securities or other property that is subject to a security interest;

"judgment" means a judgment, order or award of

- (a) the Supreme Court of Canada relating to an appeal from a British Columbia court;
- (b) the British Columbia Court of Appeal;
- (c) the Supreme Court of British Columbia;
- (d) a County Court of British Columbia;
- (e) the Provincial Court of British Columbia; and
- (f) an arbitration under a submission to which the *Arbitration Act* applies;

"secured party" means a person who has a security interest;

"security agreement" means an agreement that creates or provides for a security interest;

"security interest" means an interest in collateral that secures payment or performance of an obligation;

"trust" includes express, implied and constructive trusts, whether or not the trustee has a beneficial interest in the trust property, and whether or not the trust arises only by reason of a transaction impeached, and includes the duties incident to the office of personal representative, but does not include the duties incident to the estate or interest of a secured party in collateral.

1975-37-1.

Application of Act

2. Nothing in this Act interferes with

- (a) a rule of equity that refuses relief, on the grounds of acquiescence, to a person whose right to bring an action is not barred by this Act;
- (b) a rule of equity that refuses relief, on the ground of laches, to a person claiming equitable relief in aid of a legal right, whose right to bring the action is not barred by this Act; or
- (c) any rule or law that establishes a limitation period, or otherwise refuses relief, with respect to proceedings by way of judicial review of the exercise of statutory powers.

1975-37-2.

Limitation periods

3. (1) After the expiration of 2 years after the date on which the right to do so arose a person shall not bring an action

- (a) for damages in respect of injury to person or property, including economic loss arising from the injury, whether based on contract, tort or statutory duty;

(b) for trespass to property not included in paragraph (a);

(c) for defamation;

(d) for false imprisonment;

(e) for malicious prosecution;

(f) for tort under the *Privacy Act*;

(g) under the *Family Compensation Act*;

(h) for seduction.

(2) After the expiration of 10 years after the date on which the right to do so arose a person shall not bring an action

(a) against the personal representatives of a deceased person for a share of the estate;

(b) against a trustee in respect of any fraud or fraudulent breach of trust to which the trustee was party or privy;

(c) against a trustee for the conversion of trust property to the trustee's own use;

(d) to recover trust property or property into which trust property can be traced against a trustee or any other person;

(e) to recover money on account of a wrongful distribution of trust property against the person to whom the property is distributed, or a successor;

(f) on a judgment for the payment of money or the return of personal property.

(3) A person is not governed by a limitation period and may at any time bring an action

(a) for possession of land where the person entitled to possession has been dispossessed in circumstances amounting to trespass;

(b) for possession of land by a life tenant or remainderman;

(c) on a judgment for the possession of land;

(d) by a debtor in possession of collateral to redeem that collateral;

(e) by a secured party in possession of collateral to realize on that collateral;

(f) by a landlord to recover possession of land from a tenant who is in default or over holding;

(g) relating to the enforcement of an injunction or a restraining order;

(h) to enforce an easement, restrictive covenant or profit à prendre;

(i) for a declaration as to personal status;

(j) for or declaration as to the title to property by any person in possession of that property.

(4) Any other action not specifically provided for in this Act or any other Act shall not be brought after the expiration of 6 years after the date on which the right to do so arose.

(5) Without limiting the generality of subsection (4) and notwithstanding subsections (1) and (3), after the expiration of 6 years after the date on which right to do so arose an action shall not be brought

(a) by a secured party not in possession of collateral to realize on that collateral;

(b) by a debtor not in possession of collateral to redeem that collateral;

(c) for damages for conversion or detention of goods;

(d) for the recovery of goods wrongfully taken or detained;

(e) by a tenant against a landlord for the possession of land, whether or not the tenant was dispossessed in circumstances amounting to trespass;

(f) for the possession of land by a person who has a right to enter for breach of a condition subsequent, or a right to possession arising under possibility of reverter of a determinable estate.

(6) No beneficiary, as against whom there would be a good defence by virtue of this section, shall derive any greater or other benefit from a judgment or order obtained by another beneficiary than he could have obtained if he had brought the action or other proceeding and this section had been pleaded.

(7) In subsections (3) and (5) "debtor" means a person who owes payment or other performance of an obligation secured, whether or not he owns or has rights in the collateral.

1975-37-3

Courterclaim, etc.

4. (1) Where an action to which this or any other Act applies has been commenced, the lapse of time limited for bringing an action is no bar to

(a) proceedings by counterclaim, including the adding of a new party as a defendant by counterclaim;

(b) third party proceedings;

(c) claims by way of set off; or

(d) adding or substituting of a new party as plaintiff or defendant,

under any applicable law, with respect to any claims relating to or connected with the subject matter of the original action.

(2) Subsection (1) does not operate so as to enable one person to make a claim against another person where a claim by that other person

(a) against the first mentioned person; and

(b) relating to or connected with the subject matter of the action,

is or will be defeated by pleading a provision of this Act as a defence by the first mentioned person.

(3) Subsection (1) does not operate so as to interfere with any judicial discretion to refuse relief on grounds unrelated to the lapse of time limited for bringing an action.

(4) In any action the court may allow the amendment of a pleading, on terms as to costs or otherwise that the court considers just, notwithstanding that between the issue of the writ and the application for amendment a fresh cause of action disclosed by the amendment would have become barred by the lapse of time.

1975-37-4

Confirmation of cause of action

5. (1) Where, after time has commenced to run with respect to a limitation period fixed by this Act, but before the expiration of the limitation period, a person against whom an action lies confirms the cause of action, the time during which the limitation period runs before the date of the confirmation does not count in the reckoning of the limitation period for the action by a person having the benefit of the confirmation against a person bound by the confirmation.

(2) For the purposes of this section,

(a) a person confirms a cause of action only if he

(i) acknowledges a cause of action, right or title of another; or

(ii) makes a payment in respect of a cause of action, right or title of another;

(b) an acknowledgment of a judgment or debt has effect
  (i) whether or not a promise to pay can be implied from it; and
  (ii) whether or not it is accompanied by a refusal to pay;
(c) a confirmation of a cause of action to recover interest on principal money operates also as a confirmation of a cause of action to recover the principal money; and
(d) a confirmation of a cause of action to recover income falling due at any time operates also as a confirmation of a cause of action to recover income falling due at a later time on the same amount.

(3) Where a secured party has a cause of action to realize on collateral,
(a) a payment to him of principal or interest secured by the collateral; or
(b) any other payment to him in respect of his right to realize on the collateral, or any other performance by the other person of the obligation secured,

is a confirmation by the payer or performer of the cause of action.

(4) Where a secured party is in possession of collateral,
(a) his acceptance of a payment to him of principal or interest secured by the collateral; or
(b) his acceptance of
  (i) payment to him in respect of his right to realize on the collateral; or
  (ii) any other performance by the other person of the obligation secured,

is a confirmation by him to the payer or performer of the payer's or performer's cause of action to redeem the collateral.

(5) For the purposes of this section, an acknowledgment must be in writing and signed by the maker.

(6) For the purposes of this section, a person has the benefit of a confirmation only if the confirmation is made to him or to a person through whom he claims, or if made in the course of proceedings or a transaction purporting to be under the *Bankruptcy Act* (Canada).

(7) For the purposes of this section, a person is bound by a confirmation only if
(a) he is a maker of the confirmation;
(b) after the making of the confirmation, he becomes, in relation to the cause of action, a successor of the maker;
(c) the maker is, at the time when he makes the confirmation, a trustee, and the first mentioned person is at the date of the confirmation or afterwards becomes a trustee of the trust of which the maker is a trustee; or
(d) he is bound under subsection (8).

(8) Where a person who confirms a cause of action to
(a) recover property;
(b) enforce an equitable estate or interest in property;
(c) realize on collateral;
(d) redeem collateral;
(e) recover principal money or interest secured by a security agreement, by way of the appointment of a receiver of collateral or of the income or profits of collateral or by way of sale, lease or other disposition of collateral or by way of other remedy affecting collateral; or

(f) recover trust property or property into which trust property can be traced, is on the date of the confirmation in possession of the property or collateral, the confirmation binds any person in possession during the ensuing period of limitation, not being, or claiming through, a person other than the maker who is, on the date of the confirmation, in possession of the property or collateral.

(9) For the purposes of this section, a confirmation made by or to an agent has the same effect as if made by or to the principal.

(10) Except as specifically provided, this section does not operate to make any right, title or cause of action capable of being confirmed which was not capable of being confirmed before July 1, 1975.

1975-37-5.

Running of time postponed

6. (1) The running of time with respect to the limitation period fixed by this Act for an action

(a) based on fraud or fraudulent breach of trust to which a trustee was a party or privy; or

(b) to recover from a trustee trust property, or the proceeds from it, in the possession of the trustee, or previously received by the trustee and converted to his own use,

is postponed and does not commence to run against a beneficiary until that beneficiary becomes fully aware of the fraud, fraudulent breach of trust, conversion or other act of the trustee on which the action is based.

(2) For the purposes of subsection (1), the burden of proving that time has commenced to run so as to bar an action rests on the trustee.

(3) The running of time with respect to the limitation periods fixed by this Act for an action

(a) for personal injury;

(b) for damage to property;

(c) for professional negligence;

(d) based on fraud or deceit;

(e) in which material facts relating to the cause of action have been wilfully concealed;

(f) for relief from the consequences of a mistake;

(g) brought under the *Family Compensation Act;* or

(h) for breach of trust not within subsection (1)

is postponed and time does not commence to run against a plaintiff until the identity of the defendant is known to him and those facts within his means of knowledge are such that a reasonable man, knowing those facts and having taken the appropriate advice a reasonable man would seek on those facts, would regard those facts as showing that

(i) an action on the cause of action would, apart from the effect of the expiration of a limitation period, have a reasonable prospect of success; and

(j) the person whose means of knowledge is in question ought, in his own interests and taking his circumstances into account, to be able to bring an action.

(4) For the purpose of subsection (3),

(a) "appropriate advice", in relation to facts, means the advice of competent persons, qualified in their respective fields, to advise on the medical, legal and other aspects of the facts, as the case may require;

(b) "facts" include
   (i) the existence of a duty owed to the plaintiff by the defendant; and
   (ii) that a breach of a duty caused injury, damage or loss to the plaintiff;

(c) where a person claims through a predecessor in right, title or interest, the knowledge or means of knowledge of the predecessor before the right, title or interest passed is that of the first mentioned person;

(d) where a question arises as to the knowledge or means of knowledge of a deceased person, the court may have regard to the conduct and statements of the deceased person.

(5) The burden of proving that the running of time has been postponed under subsection (3) is on the person claiming the benefit of the postponement.

(6) Subsection (3) does not operate to the detriment of a bona fide purchaser for value.

(7) The limitation period fixed by this Act with respect to an action relating to a future interest in trust property does not commence to run against a beneficiary until the interest becomes a present interest.

1975-37-6

Persons under disability

7. (1) Where, at the time the right to bring an action arises, a person is under a disability, the running of time with respect to a limitation period fixed by this Act is postponed so long as that person is under a disability.

(2) Where the running of time against a person with respect to a cause of action has been postponed by subsection (1) and that person ceases to be under a disability, the limitation period governing that cause of action is the longer of either

(a) the period which that person would have had to bring the action had that person not been under a disability, running from the time that the cause of action arose; or

(b) such period running from the time that the disability ceased, but in no case shall that period extend more than 6 years beyond the cessation of disability.

(3) Where, after time has commenced to run with respect to a limitation period fixed by this Act, but before the expiration of the limitation period, a person having a cause of action comes under a disability, the running of time against that person is suspended so long as that person is under a disability.

(4) Where the running of time against a person with respect to a cause of action has been suspended by subsection (3) and that person ceases to be under a disability, the limitation period governing that cause of action is the longer of either

(a) the length of time remaining to bring an action at the time the person came under the disability; or

(b) one year from the time that the disability ceased.

(5) For the purposes of this section,

(a) a person is under a disability while he is
   (i) a minor; or
   (ii) in fact incapable of or substantially impeded in the management of his affairs; and

(b) "guardian" means a parent or guardian having actual care and control of a minor or a committee appointed under the *Patients Property Act*.

(6) Notwithstanding subsections (1) and (3), where a person under a disability has a guardian and anyone against whom that person may have a cause of action causes a notice to proceed to be delivered to the guardian and to the Public Trustee in accordance with this section, time commences to run against that person as if he had ceased to be under a disability on the date the notice is delivered.

(7) A notice to proceed delivered under this section must

- (a) be in writing;
- (b) be addressed to the guardian and to the Public Trustee;
- (c) specify the name of the person under a disability;
- (d) specify the circumstances out of which the cause of action may arise or may be claimed to arise with such particularity as is necessary to enable the guardian to investigate whether the person under a disability has the cause of action;
- (e) give warning that a cause of action arising out of the circumstances stated in the notice is liable to be barred by this Act;
- (f) specify the name of the person on whose behalf the notice is delivered; and
- (g) be signed by the person delivering the notice, or his solicitor.

(8) Subsection (6) operates to benefit only those persons on whose behalf the notice is delivered and only with respect to a cause of action arising out of the circumstances specified in the notice.

(9) The onus of proving that the running of time has been postponed or suspended under this section is on the person claiming the benefit of the postponement or suspension.

(10) A notice to proceed delivered under this section is not a confirmation for the purposes of this Act and is not an admission for any purpose.

(11) The Attorney General may make regulations prescribing the form, content and mode of delivery of a notice to proceed.

1975-37-7

Ultimate limitation

8. (1) Subject to section 3 (3), but notwithstanding a confirmation made under section 5 or a postponement or suspension of the running of time under section 6, 7 or 12, no action to which this Act applies shall be brought after the expiration of 30 years from the date on which the right to do so arose, or in the case of an action against a hospital, as defined in section 1 or 25 of the *Hospital Act*, or hospital employee acting in the course of employment as a hospital employee, based on negligence, or against a medical practitioner based on professional negligence or malpractice, after the expiration of 6 years from the date on which the right to do so arose.

(2) Subject to subsection (1), the effect of sections 6 and 7 is cumulative.

1975-37-8; 1977-76-19

Cause of action extinguished

9. (1) On the expiration of a limitation period fixed by this Act for a cause of action to recover any debt, damages or other money, or for an accounting in respect of any matter, the right and title of the person formerly having the cause of action and of a person claiming through him in respect of that matter is, as against the person against whom the cause of action formerly lay and as against his successors, extinguished.

(2) On the expiration of a limitation period fixed by this Act for a cause of action specified in column 1 of the following table, the title of a person formerly having the cause of action to the property specified opposite the cause of action in column 2 of the table and of a person claiming through him in respect of that property is, as against the person against whom the cause of action formerly lay and as against his successors, extinguished.

Column 1	Column 2
Cause of action	*Property*
For conversion or detention of goods.	The goods.
To enforce an equitable estate or interest in land.	The equitable estate or interest.
To redeem collateral, in the possession of the secured party.	The collateral.
To realize on collateral in the possession of the debtor.	The collateral.
To recover trust property or property into which trust property can be traced.	The trust property or the property into which the trust property can be traced, as the case may be.
For the possession of land by a person having a right to enter for a condition subsequent broken or a possibility of reverter of a determinable estate.	The land.

(3) A cause of action, whenever arising, to recover costs on a judgment or to recover arrears of interest on principal money is extinguished by the expiration of the limitation period fixed by this Act for an action between the same parties on the judgment or to recover the principal money.

1975-37-9

Conversion or detention of goods

10. Where a cause of action for the conversion or detention of goods accrues to a person and afterwards, possession of the goods not having been recovered by him or by a person claiming through him,

(a) a further cause of action for the conversion or detention of the goods;

(b) a new cause of action for damage to the goods; or

(c) a new cause of action to recover the proceeds of a sale of the goods,

accrues to him or a person claiming through him, no action shall be brought on the further or new cause of action after the expiration of 6 years from the date on which the first cause of action accrued to the plaintiff or to a person through whom he claims.

1975-37-10

Completion of enforcement process

11. (1) Notwithstanding section 3 or 9, where, on the expiration of the limitation period fixed by this Act with respect to actions on judgment, there is an enforcement process outstanding, the judgment creditor or his successors may

(a) continue proceedings on an unexpired writ of execution, but no renewal of the writ shall be permitted;

(b) commence or continue proceedings against land on a judgment registered under the *Court Order Enforcement Act*, Part 3, but no renewal of the registration shall be permitted unless those proceedings have been commenced; or

(c) continue proceedings in which a charging order is claimed.

(2) Where a court makes an order staying execution on a judgment, the running of time with respect to the limitation period fixed by this Act for actions on that judgment is postponed or suspended for so long as that order is in force.

1975-37-11

Adverse possession

12. Except as specifically provided by this or any other Act, no right or title in or to land may be acquired by adverse possession.

1975-37-12

Foreign limitation law

13. Where it is determined in an action that the law of a jurisdiction other than British Columbia is applicable and the limitation law of that jurisdiction is, for the purposes of private international law, classified as procedural, the court may apply British Columbia limitation law or may apply the limitation law of the other jurisdiction if a more just result is produced.

1975-37-13

Transitional provisions

14. (1) Nothing in this Act revives any cause of action that is statute barred on July 1, 1975.

(2) Subject to subsections (1) and (3), this Act applies to actions that arose before July 1, 1975.

(3) If, with respect to a cause of action that arose before this Act comes into force, the limitation period provided by this Act is shorter than that which formerly governed the cause of action, and will expire on or before July 1, 1977, the limitation period governing that cause of action shall be the shorter of

(a) 2 years from July 1, 1975; or

(b) the limitation period that formerly governed the cause of action.

(4) Subject to subsection (1), a confirmation effective under section 5 is effective, whether given before, on or after July 1, 1975.

(5) Nothing in this Act interferes with any right or title to land acquired by adverse possession before July 1, 1975.

1975-37-14; 1977-76-19

Repeal of special limitations

15. (1) Where an Act that incorporates or constitutes a private or public body contains a provision that would have the effect of limiting the time in which an action

(a) within section 3 (1), (2) and (3); or

(b) to enforce any right or obligation not specifically created by that Act,

may be brought against that body, that provision is repealed to the extent that it is inconsistent with this Act.

(2) Subsection (1) does not apply to a limitation provision that specifically provides that it operates notwithstanding this Act.

1975-37-16

APPENDIX B. CHAPTER VII A OF THE ONTARIO REPORT

CHAPTER VII

MISCELLANEOUS PROBLEMS

A. EXTINGUISHMENT OF RIGHT

It has long been said that the statute bars the remedy but does not extinguish the right. The only provision in *The Limitations Act* which provides for extinguishment of right is section 15, dealing with actions to recover land. At the end of the ten-year period during which the action may be brought, not only is the claimant barred from claiming his remedy but his right (i.e., title) is extinguished. Apart from section 15, the right still exists once the time for bringing the action has passed and the bar to the remedy has been raised. Thus, in tort, contract and personal property actions, the claimant has lost the remedy, although he still retains the right which would have entitled him to that remedy. In virtually all cases, the practical result is the same as if the right were extinguished. A right without a remedy is valueless.

This distinction has been much criticized, particularly in the area of conflict of laws, where the courts have characterized statutes of limitation as procedural or substantive according to whether they provided for extinguishment of title or merely barred the remedy. Dean Falconbridge in his article, The Disorder of the Statutes of Limitation (21 Canadian Bar Review 670 at p. 788), pointed out:

> It may also be observed generally that "right" and "remedy" are ambiguous and misleading terms. A "right" is not something which has an objective existence independently of a "remedy". . . .

Franks, the author of the most recent English treatise on limitations states (at p. 30) with reference to the statute barring the remedy but leaving the right:

> This state of affairs is very well settled by authority but is, it is suggested, unsatisfactory since it fails to eliminate uncertainty (the prime benefit of the Statute) . . . .

Certainly, the purpose of a limitation statute is to prevent persons from suing after the lapse of a particular time. The Commission believes that it is both more realistic and theoretically sound for the legislation to state that the claimant's right no longer exists once time has expired, rather than to merely bar the remedy.

The Wright Committee in England decided against recommending a general extinguishment. Its report referred to nine instances where the continuing existence of the right after the remedy was barred had some significance. (See p. 32 et seq.)

However, the New South Wales Commission thoroughly reviewed the nine situations mentioned in the Wright report, as well as a further instance which had arisen in Tasmania, and concluded that there should be a general extinguishment. (See paras. 306 to 323.)

The ten situations discussed in the New South Wales Report are set out below and examined.

1. Where a debtor pays money on account of debts, some of which are statute-barred and some not, and the money is not appropriated to any particular debt, the creditor may apply the money to one of the statute-barred debts. The New South Wales Commission considered it undesirable for a creditor to be able to recoup his losses in this way. Its report stated that

   > . . . The shadowy continuance of the right without remedy is an unnecessary complication of the law and may conceivably lead, on the one hand, to manoeuvres of the creditor with a view to obtaining payment without action and, on the other hand, to the debtor abstaining from further business transactions with the creditor and to that extent restricting his freedom of action. The continued existence of the right after the law has taken away the remedy is a situation which, we think, a modern system of law should avoid.

   This Commission agrees with the above statement. It noted, as well, that the Wright Committee did not consider this instance of importance in practice.

2. An executor may, in the case of a specific or residuary legatee under a will, deduct from the legacy the amount of any statute-barred debt from the estate (if payment of the debt would have swelled the fund out of which the legacy is payable). Thus the legatee is treated as already receiving a part of the estate equivalent to the debt.

   Although the Wright Committee felt that the extinguishment of the right to the debt would have a doubtful effect inasmuch as the legatee ought to be treated as already having received part of his legacy, the New South Wales Commission disagreed. It pointed out that the testator had the remedy in his own hands: he could have sued or he could say in his will that the legacy is to be reduced by the amount of the debt.

This Commission agrees with the New South Wales position. The testator had the opportunity to sue and refrained. He also could have revised the terms of his will.

3. An executor may pay a statute-barred debt, even one owing by the estate to himself. However, his right to make such a payment ceases to exist if a court has declared in an administration suit that the debt is statute-barred.

   Both the Wright Committee and the New South Wales Commission did not consider this situation of importance since the right of the executor to pay in this manner could nearly always be defeated by an application to court. The latter body stated it would therefore be better to extinguish the right to save the possible expense of court applications.

   This Commission agrees. Furthermore, it can see no good reason why a statute-barred creditor should benefit at the expense of the beneficiaries under the will. (See *In Re Yates* (1902), 4 O.L.R. 580, referred to supra, at p. 28.)

4. A trustee may pay statute-barred costs, and apparently statute-barred debts.

   Both the Wright Committee and the New South Wales Commission said this did not often happen in practice.

   As in situation 3, this Commission sees no good reason why a statute-barred creditor should benefit at the expense of the beneficiaries. (See *Re Alice Kerr* (1911), 2 O.W.N. 1342, referred to supra, at p. 28.)

5. Certain liens and charges may be enforced although the debt which they secure may be statute-barred. These would include a solicitor's lien, and possessory liens. It would also include an equitable charge on shares, which can be enforced by foreclosure or sale.

   The Wright Committee, and it appears the New South Wales Commission, thought this to be the most significant situation in which the continuance of the right played a part. Both bodies recommended provisions limiting the time in which actions to enforce liens and charges could be brought.

   However, the case of a creditor who has in his possession a security which he can realize without action would not be affected by these provisions.

   The Wright Committee did not think that the right to enforce such a security should be limited. Its report stated:

   > A creditor naturally refrains from bringing an action so long as he holds an ample collateral security, and it would be inconvenient to both parties if he were compelled to enforce the

> security or lose his right altogether. We certainly do not desire to bring this about.

The New South Wales Commission agreed insofar as possessory liens were concerned but disagreed insofar as the right of mortgagees of personal property had powers to realize on their security without action. In respect of the latter, the New South Wales Report states:

> But we think that the creditor has sufficient freedom of action if he has twelve years in which to exercise his powers after the last payment of principal or interest and the debtor can always relieve the creditor of any compulsion which he might otherwise feel: the debtor may give an acknowledgment.

(The twelve-year period mentioned is the same as that recommended for the recovery of money charged on personal property. In Ontario, the recommended period is ten years.)

In the case of possessory liens, however, the New South Wales Commission recommended special treatment. Its Report states:

> We would save a debt secured by possessory lien on goods from extinction for as long as the owner of the goods has a cause of action for the conversion or detention of the goods or to recover the proceeds of sale of the goods, but only so far as is necessary to support and give effect to the lien.

This Commission does not agree that possessory liens should be so treated. It considers that they should be governed in the same way as the rights of mortgagees of personal property to realize on their securities without action. The New South Wales Commission's reasoning in respect to the latter applies to possessory liens, insofar as creditors have a power of sale. Such a power has been conferred on him by statute in nearly all cases. (See, for example, s. 3 of *The Innkeepers Act*, R.S.O. 1960, c. 189; s. 48 of *The Mechanics' Lien Act*, R.S.O. 1960, c. 233; and s. 4 of *The Warehousemen's Lien Act*, R.S.O. 1960, c. 423.) However, there is no power of sale in the case of a solicitor's lien for obvious reasons. The solicitor's lien would, however, be good for ten years from the date when the debt became due or from the last payment on account of the debt or from the last acknowledgment, as in the case of other charges on property. If the ten-year period is about to lapse, the solicitor will have to sue and obtain a judgment to protect his position.

Thus, this Commission does not consider that extinguishment of right poses a problem with respect to possessory liens or other charges on personal property, which requires special treatment. It believes all charges on property should be subject to enforcement within a ten-year period. This subject was dealt with in Chapter IV.

6. When personal property is converted, the right (title) to that property still exists in the owner, although his action is statute-

barred. Consequently, if a fresh conversion takes place by a second person, the statute runs anew (against the second person).

The Wright Committee thought this was the only case where a clear argument in favour of the extinction of title could be made. The Committee felt that an action to recover personal property was analogous to an action to recover land. However, they made no recommendation on the point as "it is quite obvious that the necessity for clearing the title is of far less importance in the case of chattels than in the case of land".

Nevertheless, the 1939 Act did contain a provision (s. 3) which does extinguish title in cases of conversion after time has run. The New South Wales Report recommends a similar provision.

Dean Falconbridge recommended the English provision to the Conference on Uniformity which introduced it into the Uniform Act in 1944. (See s. 45.) It has been the law of a number of provinces for some time.

This Commission believes that this is the most important instance in which extinguishment of right would operate. It puts title to tangible personal property on the same basis as title to real property. Thus, needed protection would be given to persons acquiring converted goods in the same way as it is now given to purchasers of land under section 15 of the Ontario statute.

7. Apparently a statute-barred creditor may present a bankruptcy petition, and although the debtor may plead the statute, no other creditor can object. As against any creditor, other than the creditor who presented the petition, the trustee in bankruptcy is bound to plead the statute.

It may be that such a creditor would not be entitled to petition under the *Canadian Bankruptcy Act*, (R.S.C. 1952, c. 14) but the statute is not clear on the point. (But see Duncan and Reilly, *Bankruptcy in Canada*, at p. 541.)

Of this situation, the Wright Committee said that, if it is good law, it is of slight importance. The New South Wales Commission agreed, stating:

> . . . so far as bankruptcy questions are open to control by the law of New South Wales, we see no harm in the extinguishment of the right to a statute-barred debt.

This Commission is in agreement with that statement, which has particular relevance in view of this province's constitutional position in bankruptcy matters. Furthermore, this Commission can see no merit in allowing a statute-barred creditor to benefit at the expense of other creditors who have valid claims, merely because he happens to present the petition.

8. A debt incurred as the result of a tort (for example, hospital expenses in a negligence action) may be claimed as part of the damages flowing from that tort notwithstanding that the debt has become statute-barred.

Such a case is unlikely to occur under either the existing or proposed legislation. Personal injury actions are generally under the former and would be under the latter subject to shorter limitation periods than contract actions. However, it is conceivable under the proposed legislation, that a debt incurred in respect of an injury of which the debtor was not aware could become statute-barred before the tort claim. This would result from the extension of time which would be permitted in such a case in respect of the tort claim.

The New South Wales Commission were not prepared to find the unlikely possibility of such a case arising a reason for saving statute-barred debts from extinction.

This Commission agrees. It considers that there is little to be said in favour of allowing such statute-barred claims to be made in tort actions. There is no reason why the debtor should be reimbursed for a debt which his creditor can no longer collect.

9. Where a claim is one to which foreign substantive law applies, the local limitation law is applied as it is regarded as procedural on the ground that it bars the remedy and does not extinguish the right. On the other hand, if the statute of limitation of the particular foreign jurisdiction extinguishes the right it will become applicable as part of the substantive law of that jurisdiction.

This position in the conflict of laws has been much criticized and is dealt with in Part B of this Chapter.

The Wright Committee pointed out that the distinction between barring the remedy and extinguishing the right was of great importance in private international law but declined a suggestion that it should consider the matter in its Report.

The New South Wales Commission, however, strongly believed that extinguishment of right would greatly improve the law in this area. It would result in the New South Wales limitations law being classified as substantive by foreign courts. It would thus become applicable in foreign courts in cases in which the substantive law of New South Wales was applicable. "This", the New South Wales Report states, "is a consequence which appears to us to be natural and proper and we do not find anything in it which goes against our proposal that rights and titles should in general be extinguished when the causes of action for their enforcement are statute-barred".

This Commission agrees. As mentioned above, the question of classification of limitations statutes in conflicts will be dealt with later in this Chapter.

10. The rule of equity that a debt owed to a testator by a person who becomes executor of his will should be treated as an asset of the estate has been applied to a statute-barred debt.

    The New South Wales Commission pointed out that this consequence of probating a will would normally be outside the contemplation of both the executor and the person named as executor. It found that the continued existence of the debt in such a case has "more mischief than utility".

    This Commission agrees. The testator could have sued for the debt in his lifetime before the debt became statute-barred. He chose not to. His appointment of the debtor as executor should not result in the debt suddenly becoming collectible. In any event, such cases would incur most infrequently.

After reviewing the ten situations referred to above, the New South Wales Commission concluded:

> We think it a useful reform to extinguish the right when the cause of action for its enforcement is barred and thus abolish a number of complicated rules of law which have little practical importance but stand merely as an occasional embarrassment to the student, the lawyer and the citizen.

This Commission wholeheartedly agrees with this statement. Accordingly, it recommends that there should be an extinguishment of right in all causes of action once the time for bringing action has lapsed.

The Scottish Law Commission, it should be noted, apparently is also in agreement with this view. In its recent memorandum setting out tentative proposals for prescription and limitation reform in Scotland, the extinguishment of right principle was used as a basis. The memorandum states (at p. 42) that, while no concluded view had been reached:

> A contributory factor in our deciding to formulate our proposals based on the extinctive alternative is the fact that the Law Reform Commission of New South Wales . . . decided in favour . . . .

(NOTE: The extinction of title provision will have to be co-ordinated with the extension of time procedure recommended earlier for those personal injury and property damage situations where the potential plaintiff is not aware of his cause of action. It would be possible to apply for an extension of time after the two-year period has passed, i.e., after the right is extinguished. If the application for extension is granted, the result will be to revive the right. Neither the New South Wales Commission nor this Commission believe that this should cause difficulty. For clarification, however, the proposed statute should provide that, in such cases, the prior expiration of the limitation period should have no effect. Section 61 of the draft New South Wales bill so provides.)

(NOTE: The adoption of the extinction of right recommendation could result in a defendant relying on a defence by which he simply denies the right and title of the plaintiff, rather than explicitly pleading the Statute as he is now required to do by the Rules of Practice. It may be that consideration would have to be given to whether or not any change in the Rules would be desirable.)

The Commission's recommendation is:

There should be an extinguishment of right in all causes of action where the time for bringing action has lapsed.

APPENDIX C. SPECIALIZED ALBERTA ACTS WITH LIMITATION OR NOTICE PROVISIONS

Appendix C contains a list of the specialized statutes in Alberta which we believe contain limitation or notice provisions which are within the scope of this report. We have attempted to exclude limitation and notice provisions which are related to (1) the time of commencement of prosecutions for provincial offences; (2) proceedings before administrative and ministerial authorities exercising statutory powers; (3) claims requesting judicial review of the exercise of statutory powers; and (4) proceedings after the commencement of a civil judicial action.

Although we have made no recommendations as to the disposition of the limitation and notice provisions in the statutes listed in Appendix C, we nevertheless invite comments on this subject.

Appendix C is organized in a columnar form, with columns 1 to 4 running from left to right. Column 1 contains the name of the Act, column 2 contains the chapter designation for the Act in the Revised Statutes of Alberta 1980, and column 3 contains the section or subsection number of the limitation or notice provisions. Column 4 contains letters indicating whether the provisions are, in our view, limitation or notice provisions, and if the latter, the type of notice provisions. In column 4 the letter or letters have the following meanings:

L	Limitation.
NAE	Notice after event.
NBA	Notice before action.
MN	Miscellaneous notice.

1. Name of Act	2. Chap.	3. Sect.	4. Type
Administration of Estates	A-1	39	MN
		42	L
		50(2)	L
Age of Majority	A-4	12	L
Alberta Income Tax	A-31	44.1(4)	L
Bulk Sales	B-13	12	L
Business Corporations	B-15	36(5)	L
		113(9)	L
		114(4)	L
		125(2)	L
		219(2)	L
		219(4)	L
Chattel Securities Registries	C-7.1	12(2)	L
Companies	C-20	14(5)	L
		45(5)	L
		47(3)	L
		91	L
		100(2)	L
Co-operative Marketing Association and Rural Utilities Guarantee	C-25	12(6)	L
Credit Union	C-31	105(2)	L
		105(3)	L
Defamation	D-6	13(1)	NAE
		13(1)	NBA
Dower	D-38	11(4)	L
Election	E-2	207(1)	L
		207(2)	L
Expropriation	E-16	63(4)	NAE
Family Relief	F-2	15(1)	L
Fraudulent Preferences	F-18	3	L
Individual Rights Protection	I-2	6(6)	L

Name of Act	Chap.	Sect.	Type
Insurance	I-5	165(2)	L
		171(2)	L
		210	NBA
		275(1)	L
		299	NAE
		299	L
		320(2)	L
		332	L
		357	NAE
		357	L
		395	NAE
		414	NAE
		414	L
Irrigation	I-11	172(1)	NAE
		181(2)	NAE
Land Titles	L-5	122(3)	L
		164	NBA
		168(1)	L
		168(2)	L
Maintenance and Recovery	M-2	14(1)	L
Masters and Servants	M-8	9	L
Matrimonial Property	M-9	6(1)	L
		6(2)	L
		6(3)	L
Motor Vehicle Accident Claims	M-21	6(1)	MN
		9(2)	NAE
		9(3)	L
		9(7)	L
Municipal Government	M-26	188(9)	NAE
		188(9)	L
		190	L
		402(1)	NAE
		404	NAE
		405	NAE
Public Highways Development	P-28	38(8)	NAE
		39(3)	NAE
Reciprocal Enforcement of Judgments	R-6	2(1)	L
Securities	S-6.1	175	L

Name of Act	Chap.	Sect.	Type
Trust Companies	T-9	45(2) 77(2)	L L
Ultimate Heir	U-1	6	L
Water, Gas, Electric and Telephone Companies	W-4	15	NAE
Woodmen's Lien	W-14	9(1)	L